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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM,

Plaintiff and Respondent,

v.

MICHAEL AGUIRRE AND THE CITY OF SAN DIEGO,

Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT FOR SAN DIEGO COUNTY
(CASE NOS. GIC841845, GIC851286, GIC852100)
HON. JEFFREY BARTON, JUDGE

APPELLANTS' REPLY BRIEF

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MICHAEL AGUIRRE AND THE CITY OF SAN DIEGO

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I. INTRODUCTION

When one dispassionately examines this case, it is difficult to fathom that there could be any debate. The California Constitution and City Charter both forbid creation of unfunded government liability without voter approval—a prohibition recently confirmed as to public pension liability. California law and the City Charter both forbid government officials—including board members—from acting on public matters in which they have a personal financial interest. Actions taken in violation of these laws are void: they give rise to no rights in any party, and they cannot be ratified. The only way to cure the defect is through new governmental action, with full disclosure and compliance with law.

There can be no dispute: SDCERS violated these laws and SDCERS is attempting to collect on obligations made in violation of these laws.

As to the debt limit laws, as the trial court found, City officials, including the SDCERS Board, adopted MP I and MP II, which created hundreds of millions of dollars in new City debt consisting of employee pension benefits liability ***and*** reduced pension system funding, a scheme "contingent" upon SDCERS' approval. SDCERS' actions saddled current and future City taxpayers with liability without supporting revenues and without voter approval, in clear violation of state and local debt limit laws.

The Unions do not dispute that the law was violated. Instead, they seek to preserve this unlawful debt by arguing that SDCERS had no legal authority to set

benefits so it cannot be sued. This argument ignores the fact that SDCERS unquestionably is the sole public entity with authority over pension system funding, and therefore is directly responsible for the funding shortfall it permitted, and SDCERS unquestionably is attempting to collect on the illegally created obligations. And, as to benefits, the Unions' argument that SDCERS exceeded its legal authority because it should not have been acting to increase benefits does not avoid SDCERS' liability—it ***confirms*** that liability.

As to the conflict of interest laws, there is also no question that SDCERS Board members violated these laws. They voted to approve public contracts which benefited themselves by increasing their personal pensions. Worse, to make this happen, they also allowed underfunding of the pension system that they had a constitutional fiduciary duty to protect.

Again, the Unions do not argue that SDCERS did not violate these laws. Instead, the Unions contend that the Court should ignore these violations merely because of subsequent events which do not and cannot legally cure the unlawful actions. Without authority, the Unions also argue that unlawful government contracts relating to pension benefits enjoy exalted status, when it is unquestionable that all such contracts are void *ab initio* and do not create vested rights in any third party.

In a final effort to save these illegal contracts, the Unions argue that the City's claims are time-barred. That argument has no impact on the City's debt limit law claims, however, as the statute of limitation on those claims was never

litigated and would not defeat those claims. As to the conflict of interest claims, both existing case law and new legislation make clear that a four-year statute, which admittedly renders these claims timely, should apply. At a minimum, the City should have an opportunity to prove its fact-specific tolling arguments, which improperly were rejected by the trial court on demurrer.

The City sued SDCERS—the ultimate wrongdoer. The Unions then intervened in this case, backing SDCERS and pleading a ripe and justiciable dispute. They have engaged in years of fierce litigation, asserting that all MP I and MP II pension benefits are legal. The Unions' representation of pension beneficiaries has been so rabid that the Unions have asserted (and prevailed upon) *res judicata* arguments that only the pension beneficiaries (and not the Unions themselves) could make. The Unions unreservedly claim the ability to win this case on behalf of all beneficiaries; yet, at the same time, the Unions unabashedly disavow any ability to lose the case. Because the parties to and the parties attempting to enforce the illegal contracts in question are before the court, because the City seeks only declaratory relief as to violations of law by SDCERS and no other party, and because the intervenors more than adequately represent the absent parties, the case is fully justiciable.

In sum, the SDCERS Board participated in the scheme to create retroactive and future pension benefits, benefiting its own members while placing the burden of payment for those benefits upon current and future taxpayers in violation of the debt limit and conflict of interest laws. SDCERS is undoubtedly attempting to

collect on debts created in violation of both the debt limit and conflict of interest laws. While the ultimate outcome of this situation—whether on remand to the trial court, before the City Council in curative proceedings, or in voter elections—cannot be known, this much is clear: The citizens of San Diego are entitled to have obligations incurred in violation of debt limit and conflict of interest laws at least considered on the merits.

II. REPLY STATEMENT OF FACTS

There is no debate that in adopting MP I and MP II, without voter approval, the SDCERS Board created a mammoth City liability for vastly increased pension obligations not supported by same year revenues. Nor is it disputed that, in so doing, several Board members voted to enhance their own pension benefits while allowing the pension system to be underfunded. *See, e.g.*, Respondents' Brief ("RB") at 6 ("Several of the SDCERS Board Members voting in favor of [MP I] were City employees whose retirement benefits were improved by the City's enactment of the new benefits."); 12 CT 3121:15-22 ("Several of the SDCERS board members . . . ***voting in favor of the proposal were City employees whose retirement benefits were improved by the City's enactment of the new benefits.*** The testimonial and documentary evidence established the ***City made the grant of enhanced pension benefits contingent on SDCERS approving the funding relief.***") (emphasis added); *see also infra* at 7-8, 13-14.

Seeking to divert attention from these critical facts—which establish a *per se* violation of the debt limit laws and Government Code Sections 1090 and 1092,

as well as corresponding City laws—the Unions try to absolve themselves and SDCERS from blame, casting other City officials as renegades acting "alone." *E.g.,* RB at 2 (arguing the City "*alone* was both architect and cheerleader for the pension funding strategy").

In reality, the ***Unions'*** desire for benefit increases was the impetus behind both MP I and MP II, which they enthusiastically supported and promoted. *E.g.*, Ex. 276.147 (Union representatives urged the Board to approve the proposal "to allow the general members' benefit levels to be increased . . . ."); Ex. 358 ("Hotsheet" urging MEA membership to vote to approve MP II). Indeed, former MEA President Judith Italiano frankly admitted the MEA's support of the benefits-for-funding trade off. *See* Ex. 2205 (Italiano Depo. at 4, clip 3 at 222:14-223:7); *see also* Ex. 2205 (*id.* at 5, clip 8 at 223:17-23) ("Q. Why did you agree to postponing the contributions? A. Because we wanted the benefits. Q. But—I understand that. But why did you agree to postponing the contributions? A. Because that was the way we were going to get the benefits.").

Ms. Italiano specifically testified as to the Union members' knowledge of the exchange of benefits for funding concessions:

> What I remember is that the year before, there had been major concerns from our members about the City wanting just to take funds from the system with no benefit improvements, and this time around, we made sure that team members spoke with everyone that they could in their workplaces and gave them every information they had from the table and did discuss it with people to where they were more comfortable . . . . I do know that we had to assure them that we had

> looked at the information before us. We were comfortable with it, and they were very interested in getting their new benefit.

Ex. 2205 (Italiano Depo. at 11, clip 1 at 306:4-20); *see also* Ex. 2205 (*id.* at 12, clip 7 at 303:18-22) ("We discussed it in extreme with everyone who voted").[1]

Thus, the *quid pro quo* of SDCERS granting funding relief to allow benefit increases was well known to and supported by the Unions. *See* Ex. 382; 19 RT 3070:5-20 (MEA membership was informed through "Hotsheets" and other communications that "***the City's willingness to include retirement benefit improvements was contingent on the Retirement Board's willingness to adopt the City's proposed new terms and conditions related to contributions and funding levels***") (emphasis added); Ex. 357.

The trial evidence also shows that the Unions were on notice that SDCERS Board members were financially interested in MP I and MP II. For example, Ms. Italiano testified that she knew that SDCERS Board members "that worked for the City were going to get every increase that was made for anyone." Ex. 2205 (Italiano Depo. at 5, clip 8 at 224:2-4); *see also* Ex. 2205 (*id.* at 6, clip 8 at 224:19-

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[1] Ms. Italiano confirmed in trial testimony that the deal was benefits-for-underfunding and that the deal was contingent on the SDCERS Board's approval. *See* 19 RT 3068:20–3069:3 ("Q. You had full knowledge and notice that the benefits that would have been negotiated in 2002 were conditioned upon SDCERS agreeing to the terms [of MP II]? . . . A. I knew that there were requests of the City Manager to the Retirement Board that had to be taken care of before we could get our bargained agreement, yes."); *see also* 19 RT 3121:16-3122:7 ("A. The City asked us to support their request to the Retirement Board, as part of giving us those benefits, yes . . . . Q. You agreed to that, the proposal? A. ***We agreed to support to the Retirement Board what the manager was asking, yes***.") (emphasis added).

24) ("Q. . . .[Y]ou understood that they did have a financial interest in that decision to adopt or not adopt the City's proposed rate stabilization plan, right? A. I knew that they were going to get an improved benefit, yes").

Contrary to the Unions' current assertion that the City "alone" was the "cheerleader" for the managers' proposals, Ann Smith, representing MEA, wholeheartedly advocated MP II before the Board, saying that it "is an important part of MEA's analysis to seek benefit improvements which includes ***doing its own analysis, to retain its own advisors*** with regard to the City's budget," to protect the represented employees. Ex. 276.223; *id.* ("***Having reviewed the Manager's proposal, MEA has confidence in the integrity of what is being presented. If not, they wouldn't have supported it.***") (emphases added). "She [assured] the Board that its support for the Manager's proposal is important to 5,000 represented employees. ***MEA has confidence with its analysis that this is an appropriate proposal.***" *Ibid.* (emphasis added).[2]

In addition to ignoring their own pivotal role, the Unions now try to exculpate SDCERS. The Unions argue that "the City, not SDCERS, was the architect of the pension funding strategy at issue," RB at 4, ignoring that SDCERS was the ultimate ***cause*** of the proposals' adoption: SDCERS, and SDCERS alone, made possible the adoption of MP I and MP II because adoption was entirely "contingent" upon SDCERS' approval, as the trial court found, and even the

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[2] *Compare* RB at 7 ("MP I depended on the approval of outside experts retained by the City and SDCERS, not by their employees or their unions.").

Unions have been forced to concede. *See* 12 CT 3144:24-26 ("***[T]he City produced extensive evidence in Phase One of the trial that shows the City's grant of benefits in MP 1 and MP 2 were contingent upon the grant of funding relief by the SDCERS Board.***") (emphasis added); *see also* RB at 8 ("'All proposed changes are conditioned upon and subject to . . . Retirement Board approval . . .'"); RB at 10 ("***After obtaining approval of the employees and SDCERS Board***, the Mayor and Council passed Ordinances implementing the increased benefits.") (emphasis added).[3]

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[3] The evidence that the SDCERS Board's approval was the "but for" cause of both the benefit increases and the underfunding is overwhelming. *E.g.*, Ex. 276.131 ("He [McGrory] reminded the Board that this must be treated as a package. ***If this is not approved, he stated that come January, 1997 the City would repay the contribution rate gap for 1996 and 1997, and none of the benefit improvements would occur.***"); Ex. 84.5 ("The modification and increase of benefits, as set forth in Issue No. 2 of the City Manager's proposal . . . ***is contingent upon*** the Board's approval of Issues No. 3 and 4 [relating to funding]."); Ex. 276.180 ("Mr. Grissom reported that these issues evolved out of the meet and confer process [between the City and the unions], in which a number of ***benefit enhancements were agreed upon, but made contingent upon the Board's approval of the Manager's funding proposal . . . . What the City is asking the Board to do is approve . . . a funding mechanism that would allow these benefit enhancements to be conferred.***"); Ex. 276.203 (SDCERS Administrator Lawrence Grissom "explained that . . . ***benefit enhancements . . . were subject to the Board's approval of a modification of the 1996-1997 Manager's Proposal.***"); 26 RT 4859:13-22 (Mr. Herring made it clear to the "labor organizations" in 1996 that the increased benefits were "dependent upon getting the MP I package through at SDCERS."); Exs. 272.2, 272.6 (City of San Diego Proposal to the Municipal Employees Association, May 13, 2002) ("Substantial benefit improvements granted by the City since the adoption of the 'City Manager's Retirement Proposal' dated July 23, 1996 [MP I] have created additional unfunded liability to SDCERS that was not anticipated when the City agreed to the 'trigger' provisions. ***Significant improvements in benefits are contained in this three-year proposal.*** Consequently, the 'trigger' provisions must be adjusted as a condition of the City's three-year proposal. Therefore, ***this***

Unlike the other City officials blamed by the Unions, SDCERS, and SDCERS alone, had the constitutionally-imposed fiduciary duty to serve as watchdog for the fiscal soundness of the pension system. Cal. Const., art. XVI, § 17(b). It is telling—as even the Unions concede—that SDCERS previously had refused to allow system funding reductions, changing position only when such reductions were sweetened by benefit increases. RB at 5 ("The SDCERS Board had rejected the City's proposals to reduce pension contributions in prior years when the proposals did not include benefit improvements"); 12 CT 3022:6-8 ("the City's proposals to reduce pension contributions made in the years before 1996 had been rejected by the SDCERS board. These past efforts had been made without a proposal for benefit improvements").

Ironically, while the Unions now dispute the City's characterization of SDCERS' "tampering" with funding methods, RB at 4, ***that term was coined by a Union representative and lawyer in this case*** (Ann Smith) in advocating the benefits-for-underfunding exchange:

> I also cannot over-emphasize that the level of employee scepticism [sic] and distrust regarding ***any tampering with funding methods*** related to the retirement system is enormous and will require a yeoman's effort by every person associated with MEA to overcome. ***MEA will not undertake this formidable task unless the gains in benefit levels for the employees MEA represents are clearly respectable*** and credible rather than de minimus [sic].

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three-year proposal is contingent upon, and subject to, approval by the SDCERS Board of Trustees of an adjustment to the 'trigger' provisions contained in the Manager's Proposal [I] . . . .") (emphases added); *see also* n.1, *supra*.

Ex. 87.1 (italics added).

There simply is no meaningful dispute about the fundamental facts underlying the City's claims against SDCERS: SDCERS Board members approved public contracts that increased their personal financial benefits and established an unfunded public debt without voter approval. The question for this Court is whether those facts—establishing *per se* violations of state and local conflict of interest and debt limit laws—should escape judicial scrutiny.

III. LEGAL ARGUMENT

A. SECTIONS 1090 AND 1092 AND THE DEBT LIMIT LAWS GUARANTEE GOVERNMENT INTEGRITY

1. Sections 1090 And 1092 Void Government Actions Violating The Conflict Of Interest Laws

Section 1090 requires that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." *Thomson v. Call* (1985) 38 Cal.3d 633, 650. This law is aimed at eliminating temptation, avoiding even the appearance of impropriety and assuring the government of the officer's undivided and uncompromised allegiance. *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-80. If a public official is pulled in one direction by his financial interest and in another by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality. *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330.

"The case law supports strict enforcement of conflict-of-interest statutes." *Thomson v. Call*, 38 Cal.3d at 650; *Thorpe v. Long Beach Cmty. Coll. Dist.* (2000) 83 Cal.App.4th 655, 663 (same); *see also Carson Redevelopment, supra*, 140 Cal.App.4th at 1333 ("The sweep of section 1090 is broad; within its reach comes any interest that might deter a public official from the most righteous and noble path of civil service possible").

Consistent with this strict enforcement, every contract made in violation of Section 1090 is ***void***. Cal. Gov. Code § 1092; *see also Klistoff v. Super. Ct.* (2007) 157 Cal.App.4th 469, 481; *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 877 (a contract in which a public officer is interested is void, not merely voidable). When Section 1090 is transgressed, the public entity involved is entitled to recover any compensation that it paid under the unlawful contract without restoring any of the benefits it received. *Carson Redevelopment, supra*, 140 Cal.App.4th at 1331.

The conduct alleged here—public board members voting themselves benefit increases—is precisely what Section 1090 forbids. *See Finnegan v. Schrader, supra*, 91 Cal.App.4th at 584 (affirming finding that Section 1090 voided the appointment by a board of one of its own members as district manager of a sanitary district, even though he did not personally vote); *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 538-39, 541-42; *Downey Cares v. Downey Cmty. Dev. Comm'n* (1987) 196 Cal.App.3d 983, 988-91 (invalidating a city action (an ordinance) because it was reasonably foreseeable that the ordinance

could have a material effect on a council member's financial interest; "[t]he test is whether it was reasonably foreseeable that the adoption of the plan would have a material financial effect on [the member's] property and business . . .").

2. The Debt Limit Laws Also Void Government Actions Violating The Laws' Proscriptions

Both the California Constitution and the San Diego Charter prohibit cities from incurring indebtedness or liability that exceeds income or revenue for that year without voter approval. Cal. Const., art. XVI, § 18; S.D. City Charter, art. VII, § 99. Thus, the California Constitution (and local law) prohibits the incurrence of floating debt by a city "in any manner or for any purpose." *Id.*; *see also Pension Obligation Bond Committee v. All Persons Interested* (2007) 152 Cal.App.4th 1386, 1397 ("*POB*"). Importantly, these laws contain no limitation as to who may be sued to accomplish their enforcement.

The purpose of the debt limit laws is to end the government practice of incurring liabilities in excess of income thereby creating a "floating debt to be repaid from the income of future years." *POB*, *supra*, 152 Cal.App.4th at 1397; *see also In re County of Orange* (C.D. Cal. 1998) 31 F.Supp.2d 768, 776-77 (purpose is to give people power of approval over long term expenditures). As the Court of Appeal held in *POB*, the government cannot borrow money to pay for pension debt without voter approval. *POB*, 152 Cal.App.4th at 1390; *see also id.* (putting pension system on sound financial basis means liabilities are funded as incurred rather than when they mature).

SDCERS unquestionably violated the debt limit laws: SDCERS created unfunded liabilities without voter approval by increasing benefits and by reducing current system funding. *E.g.*, 11 RT 1116:12-18; 26 RT 4890:9-14; 26 RT 4890:15-24; 19 RT 3151:20-23; 26 RT 4806:6-12 (City was incurring liability "today and pushing off the payment of those [liabilities] to the future years.").

There is no question that the Unions and SDCERS knew this was occurring. *See, e.g.*, Ex. 2205 (Italiano Depo. at 4, clip 4 at 197:22-198:4) ("Q. Was it your understanding that essentially you were, by doing this, agreeing to basically create more debt that the City was going to have to pay later? A. [*Y*]***es, I understood that the City was going to defer part of what was owed, yes.***") (emphasis added); *see also* Ex. 2205 at 4, clip 3 at 222:19-21); Ex. 371.2.

The evidence supporting this conclusion is overwhelming and uncontroverted even at this early stage (Phase One) of the litigation:

- Ex. 276.82 ("Mr. Casey stated that there is an underlying statement in the ***Charter that indicates that today's service credit must be paid for by today's taxpayers***. He stated that this proposal gives him the distinct impression that ***future taxpayers will be paying for these benefit increases*** . . . ." (emphasis added).

- Ex. 276.82 (the system's actuary agreed that "***some of these costs will be borne by the future generation.***") (emphasis added).

- Ex. 276.88 ("[*T*]***he liability of current employees/retirees are [sic] being transferred to future taxpayers.***") (emphasis added).

- Ex. 276.157-276.158 ("The total of estimated increased liabilities associated with the City Manager's proposal is $106,700,000 . . .").

- 15 RT 4889:26-4890:24 (Mr. Herring admitted that the City was postponing full payment for the cost of the increased benefits).

- Ex. 2205 at 198:10-19 (Ms. Italiano testified: "Q. ***So you understood what you were doing here was agreeing to postpone the payment of the pension benefits to taxpayers in later years? A. Correct*** . . . ") (emphasis added).

- 26 RT 4806:6-9 (Richard Vortmann, a SDCERS Board member, testified that "[v]ery clearly in regard to the pension . . . the City was not paying its bills currently. They were referring liability into the future."). He further testified that the City was incurring liability "today and pushing off the payment of those [liabilities] to future years." 26 RT 4806:10-12.

- Ex. 371.2 (Vortmann letter stating: "The problem is very simply that the city does not want to pay currently for what they want to give the employees. They clearly are addicted to the 'give now, pay later' or 'burden the future year's taxpayers' when they no longer have any say in the decision – i.e., the decision being locked down now, with the mandatory bill being paid later.") (emphasis in original).

There can be no legitimate debate: MP I and MP II violated the debt limit laws. *See* 12 CT 3120:22-25, 3121:1-4. The agreements are therefore void, regardless of the impact on third parties. *E.g.*, *San Francisco Gas Co. v. Brickwedel* (1882) 62 Cal. 641, 642 (discussed *infra*); *In re County of Orange*, *supra*, 31 F.Supp.2d at 775.

3. The Unions' Arguments That Debt Limit And Conflict Of Interest Law Violations May Be Overlooked Are Unavailing

In the face of the evidence and the trial court's findings establishing *per se* violations of the debt limit laws and Section 1090, the Unions offer two primary rejoinders: (1) the innocent beneficiary defense; and (2) reliance on advice of counsel. Neither works.

a. The Purported Rights Of Pension Beneficiaries Do Not Immunize Illegal And Void Contracts From Scrutiny

The Unions argue that the City is using these good government laws to renege on pension promises made to "innocent" beneficiaries who have relied on MP I and MP II benefits. This equitable argument fails on several grounds.

First, as a matter of undisputed fact, the Unions entered into these agreements with their eyes wide open. The Unions knew that an increase in benefits coupled with a reduction in funding was harmful to the pension system. For example, Ms. Italiano admitted that underfunding "***doesn't help the system***." Ex. 2205 (Italiano Depo. at 5, clip 8 at 224:2-4) (emphasis added); Ex. 2205 (*id.* at 6, clip 8 at 224:19-24); Ex. 2205 (*id.* at 6, clip 8 at 226:18-227:21).

The Unions also knew that the SDCERS Board was being asked to undertake official actions as to which breach of fiduciary duty concerns had been raised.[4]

The Unions also knew that red flags had been waved.[5] Indeed, the MP II proposal was so questionable, the Board members sought indemnification

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[4] For example, fiduciary counsel, Mr. Blum, warned

> the proposal posed a material risk if this were litigated in court. The judge could find that approval of the proposed amendment to the 1996 Proposal was not a prudent exercise of the Board's fiduciary duties. . . .
>
> ***In a worse case scenario, the Board and City could be sued . . . . If this were to happen, a number of things could occur. The judge could tell the Board anything from reconsidering its action all the way up to holding each Trustee personally liable for losses . . . .***
>
> ***The Board must also decouple negotiations and fiduciary decisions. One of the reasons this is such an awkward situation is that these two things have been brought together, which is very unfortunate . . .*** . The fact this year's proposal was coupled with negotiations was quite inappropriate. ***The Board's job is to administer the fund to the best of its ability and set standards, not to negotiate benefits.***

Ex. 276.187-276.189 (emphasis added).

[5] Fiduciary counsel to the Board, Mr. Hamilton, warned as to MP I

> that there were "red flags" raised in his mind by this proposal as it relates to the Board's duty of loyalty to the integrity of the fund . . . .

Ex. 276.84. Further,

> he reminded the Board that the pension beneficiaries and members have a vested right to an actuarially

protection as a pre-condition to approval.[6] Yet the Unions indicated that they had studied the ramifications of the proposals and believed they were the right course, so much so that they supported and advocated their adoption. *See supra* at 6-8; Ex. 276.223.

Second, even if the Unions and employees were blameless, these illegal agreements would still be void. It is incontrovertible that agreements made in violation of Section 1090 are void, and disgorgement of any benefits obtained under the illegal contract must occur. As *Carson Redevelopment* notes, when "section 1090 is transgressed 'the public entity involved is entitled to recover any compensation that it . . . paid under the contract without restoring any of the benefits it . . . received.'" 140 Cal.App.4th at 1331 (quoting *Finnegan*, 91

> sound system and that the Board has a duty of loyalty to the integrity of the fund that can not be contracted away.

Id. at 276.86. As for MP II, the System's actuary, Mr. Roeder, cautioned on the fiduciary breach:

> In isolation, there is nothing wrong with enhanced benefits, which people tend to favor. There is also nothing wrong with contribution relief—in isolation. However, ***when enhanced benefits come at the same time as contribution relief, the Board must be cautious***. The Manager's Proposal has been in effect for five years, ***which has allowed the City to pay less than the actuarially assumed rate. The role of a fiduciary must be independent of the setting of existing or potential benefits. He can only urge that in the future, those two functions be truly segregated.***

Ex. 276.180 (emphasis added).

6 Ex. 276.230.

Cal.App.4th at 583). The disgorgement of benefits received under a void contract is "automatic." *Id.* at 1334-36 (citations omitted). As the court wrote in *Carson*:

> If any interest compromises a public official's fidelity such that he may be influenced by personal considerations rather than the public good, then there must be a mechanism to ameliorate the concomitant injury to society. Section 1092 is that mechanism . . . .

Id. at 1334. The benefits to society are worth the individual cost:

> Ultimately, this policy serves all individuals because they comprise our communities and need every guarantee the law can provide that they will be free from the tyranny of corrupt politicians and the burden of contracts tainted by conflicts of interest.

Id. at 1331.

While the Unions argue that the City should be equitably estopped to invalidate the void MP I and MP II agreements, estoppel will not lie. *See Klistoff v. Super. Ct., supra*, 157 Cal.App.4th at 481; *G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1094 (estoppel may not be invoked to enforce a void contract); *Shasta County v. Moody* (1928) 90 Cal.App. 519, 523 (the "contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions or estoppels").

The Unions would have this Court conclude that the rules change in the pension context. They do not. In a United States Supreme Court case similar to this one, trustees of union health and retirement funds sued a coal producer (Kaiser) for contributions due under a collective bargaining agreement. *Kaiser*

Steel Corp. v. Mullins (1982) 455 U.S. 72, 74-76. Kaiser claimed that it did not owe the contributions because the collective bargaining agreement giving rise to them was illegal. *Id.* at 76. The Supreme Court agreed that Kaiser was entitled to claim the contract was illegal, and explained that ordering Kaiser to make the contributions would be tantamount to enforcing an illegal agreement, something the Court refused to do. *Id.* at 77-82. Significantly, the Court refused to enforce the illegal agreement ***even when doing so reduced the health and retirement funds of the union members***. *Id.* at 83 & n.8 (explaining that "***pension fund trustees have no special status which exempts them from the general rule that courts do not enforce illegal contracts***"); *see also Carpenters Amended & Restated Health Benefit Fund v. Cope & Smith* (N.D. Tex. 1982) 544 F.Supp. 442, 450 (court refused to require employer to contribute to pension funds when the contributions inherently were linked to an illegal agreement).[7]

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[7] Indeed, courts frequently have set aside beneficiaries' claims to pension benefits when such claims rest on an illegal agreement. *See Romano v. Retirement Bd. of the Employees' Retirement System of R.I.* (R.I. 2001) 767 A.2d 35, 38-39 & n.3, 46-47 (pension benefits that arose based on ultra vires actions, and which were in conflict with state law, could not be enforced—even when beneficiary allegedly "'committed no evil' when he feathered his retirement nest with over $100,000 in illegal public retirement benefits"); *Strong v. State of Oklahoma ex rel. The Oklahoma Police Pension & Retirement Bd.* (Okla. 2005) 115 P.3d 889, 894-95 & n.23 (retirement system could not be estopped from denying illegal benefits) (citing numerous cases); *Plainfield Township Policemen's Assn. v. Pa. Labor Relations Bd.* (Pa. Comm. Ct. 1997) 695 A.2d 984, 985 (affirming Labor Relations Board's refusal to enforce pre-existing pension benefits that were illegal under law and should never have been agreed to in collective bargaining agreement); *see also Retirement Bd. of Allegheny County v. Colville* (Pa. Comm. Ct. 2004) 852 A.2d 445, 451-52 (refusing to remand to enforce illegal retirement benefits); *Borough of Ellwood City v. Ellwood City Police Dept. Wage & Policy*

Simply put, courts do not enforce illegal contracts, no matter who the beneficiaries may be. *See Miller v. McKinnon* (1942) 20 Cal.2d 83, 89 (person who has supplied labor and materials in performance of illegal contract has no right to recover thereunder); *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 234 (same); *see also Finnegan v. Schrader*, *supra*, 91 Cal.App.4th at 584 ("Various provisions of the Labor Code do evince a strong public policy of ensuring employees are paid fully and promptly for their efforts. We do not believe that these provisions were intended to ratify illegal employment contracts or to immunize a public official from liability for a conflict of interest. The disgorgement remedy adopted by the trial court was appropriate.") (citation omitted); *Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th at 542 (city attorney who negotiated referral agreement in which he stood to benefit forfeited right to funds); *Millbrae Assn. for Residential Survival v. Millbrae* (1968) 262 Cal.App.2d at 237-38 (fact that public contract had been substantially performed would not preclude contracts from being invalid due to conflict of interest).

The same principles apply under the debt limit laws. As the Court wrote in *San Francisco Gas Co. v. Brickwedel* (1882) 62 Cal. 641:

Unit (Pa. Comm. Ct. 2002) 805 A.2d 649, 651 (refusing to enforce illegal pension benefits); *Bd. of Control of the Employees' Retirement System of Alabama v. Hadden* (Ala. Ct. Civ. App. 2002) 854 So.2d 1165, 1169 (employees' retirement system could not be estopped from suspending illegal retirement benefits); *accord City of Wilkes-Barre v. City of Wilkes-Barre Police Benevolent Assn.* (Pa. Comm. Ct. 2002) 814 A.2d 285, 288-89 (unlawful retirement benefits unenforceable where statute provides for unenforceability of excessive benefits); *cf. Parella v. Retirement Bd.* (1st Cir. 1999) 173 F.3d 46 (legislators had neither contract nor property rights to pension benefits that exceeded amount permitted by law).

> Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if ***some shall be found to suffer***. But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers.

Id. at 642-43 (emphasis added).

As a related matter, while the Unions repeatedly argued that the Court cannot take away rights that have "vested" in the beneficiaries as a result of MP I and MP II, that argument incorrectly assumes the predicate that the rights have "vested." Because MP I and MP II are void, they have not. "The words [vested rights] are generally used as implying interests which it is ***proper*** for the state to recognize and protect, and of which the individual cannot be deprived arbitrarily without injustice." *Am. States Water Serv. Co. of California v. Johnson* (1939) 31 Cal.App.2d 606, 614. As held by *Thomson*, *Carson* and *Brickwedel*, *supra*, contracts entered into in violation of Section 1090 are void and not enforceable. Thus, because the benefit contracts were illegally adopted, no pension benefits could vest under them. *Kaiser v. Mullins*, *supra,* 455 U.S. at 83 & n.8.

Finally, it is worth noting that the Unions' "innocent beneficiary" argument depends upon imaginary horribles which may never come to pass. The remedy for violation of these laws is to void the illegal action, with the government taking ***new curative action***, freed from the legal violations. *E.g.*, *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-77 (proper remedy was to remand to the council with directions requiring the council to rehear the matter

and provide a fair hearing); *see also* 17 RT 2601:9-2602:13 (Mr. McGrory testifying at trial that, after full disclosure of the conflict, "the Council would revote the item, with that [conflicted] Council member taking a walk and abstaining.").

Thus, after MP I and MP II are adjudicated invalid, the City Council may take new action as to the benefits in question, based upon input from the Unions, the taxpayers and other interested parties. ***It is therefore premature to assume that any individual employee, retiree or beneficiary will actually suffer a loss of benefits.*** The important point is that the illegality of MP I and MP II will be established and any new action will be subject to the curative effect of open and public debate and approval by legislators who will be required to find a legal way to pay for what they bestow. *Accord Carson Redevelopment*, *supra*, 140 Cal.App.4th at 1337 ("Nothing stops [the parties affected by the set aside of the unlawful official action] from going to the City of Carson to work out a contract that is not tainted by a conflict of interest").

In sum, the Unions' argument that the Court can and should ignore these laws because innocent pension beneficiaries may suffer is baseless.

b. Reliance On Advice Of Counsel Does Not Immunize Void Contracts From Scrutiny Under Good Government Laws

The Unions also suggest that because MP I and MP II were reviewed by lawyers, the contracts cannot be voided even if they were illegal. This, too, is

incorrect for several reasons.

First, the Unions' suggestion that MP I and MP II were blessed by fiduciary counsel is misleading. To the contrary, SDCERS' fiduciary counsel provided multiple warnings about the conflicts of interest inherent in the benefits-for-underfunding deal. *See* nn.4-5, *supra*. In addition, several Board members recognized that their conduct was questionable at best. *See, e.g.*, 12 CT 3028:12-18 ("Concerns regarding the propriety of the proposal were raised by a number of board members including Mr. Vortman and Ms. Shipione. The concerns covered a wide variety of issues including, but not limited to, whether the board members could approve such a proposal while fulfilling fiduciary duties, whether the pension would be adequately funded and the potential for indemnification of board members by the City from potential litigation exposure.") (citations omitted). Thus, the notion that these transactions had been given a clean bill of legal health is simply incorrect.

Second, the legal advice cited by the Unions provides no support for the action taken. According to the Unions, counsel advised that under the rule of *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 676, adverse changes to the pension system can be made if there is an offsetting benefit. RB at 6, 9-10. The apparent suggestion is that SDCERS could agree to allow the pension system to be underfunded because the City simultaneously was agreeing to increase benefits. This is an absurd application not only of simple economics, but of *Claypool*, which had nothing to do with SDCERS' fiduciary obligation as the constitutional

guardian of pension system funding, and nothing to do with void contracts under conflict of interest and debt limit laws.

Third, even if certain lawyers—be they a former City Attorney or fiduciary counsel—had approved the transactions, that approval would not save an illegal and void contract. Advice of counsel is simply not a defense to violation of these laws. *E.g.*, *Thomson v. Call*, *supra*, 38 Cal.3d at 647-48 (voiding contract where Section 1090 violated despite fact that Call "did seek and obtain advice from the city attorney on certain occasions, and he did follow the specific advice he received"); *Chapman v. Super. Ct.* (2005) 130 Cal.App.4th 261, 274 ("reliance on legal counsel's advice is not a defense to a section 1090 violation").

B. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT THE CITY CANNOT PURSUE A CLAIM THAT THE DEBT LIMIT LAWS WERE VIOLATED

1. SDCERS Is A Proper Defendant To The City's Debt Limit Law Cross-Complaint

In their Respondents' Brief, the Unions continue their remarkable refrain that SDCERS is not a proper defendant on a debt limit law claim because SDCERS is not part of the City, and therefore not within the proscriptions of those laws. RB at 100. As shown in the Opening Brief, however, there can be no question that SDCERS is part of and acts on behalf of the City. SDCERS is a creature of City law. S.D. City Charter, art. IX, §§ 141, 144. SDCERS Board members are City officials. *Id.* at § 144. And, most importantly, it is

incontrovertible under the City Charter that SDCERS is a ***department of the City***. *See* S.D. Muni. Code § 22.1801(b) (City departments include the City Retirement Board).

While the Unions contend that because SDCERS is a "public retirement system" it cannot be part of the City, they proffer no explanation for why the ***function*** of a particular department has any bearing on whether such department constitutes a part of the City. The explicit incorporation of a City department in the City Charter, not its purview, determines whether such body is part of the City.

Indeed, the trial court previously has held in this case that although SDCERS ***is*** part of the City, it is an entity that is subject to suit by the City, 3 CT 551, 552, 555, which presumably is why the Unions are forced to admit that "the trial court did not conclude that a justiciable controversy could ***never*** arise between the City and SDCERS." RB at 104. As this concession confirms, the Unions' argument that the debt limit laws do not apply to SDCERS because SDCERS is not the "city" is obviously erroneous. *See POB, supra,* 152 Cal.App.4th at 1392 (purpose of constitutional protection for public pension system is "to prohibit . . . ***any executive or legislative body of any political subdivision*** of this state from ***tampering*** with public pension funds . . . ." (internal quotes omitted) (emphasis added).[8]

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[8] *Compare Rider v. City of San Diego* (1998) 18 Cal.4th 1035, 1044 (district not one and the same as city where city not liable on agency-created indebtedness).

2. The City Can Sue SDCERS Even Though SDCERS Is A City Department

Faced with the unavoidable result that SDCERS is a City department, and therefore, by definition "the City," the Unions retreat to the fallback position that the debt limit law claim is not justiciable because the City cannot sue "itself." As shown in the Opening Brief, however, it is clear that constituent departments of the same governmental body can sue one another—precisely what is occurring in this case. *See, e.g., City Council v. McKinley* (1978) 80 Cal.App.3d 204, 207. In fact, ***SDCERS*** instituted litigation against the City regarding the legality of the pension benefits when it brought an action seeking a judicial declaration that it "may properly and legally pay all City Retirement Benefits." 1 CT 66:16-17 (SDCERS' Complaint for Declaratory Relief).

The trial court recognized that one agency of a public entity may sue another governmental agency, including in this case (3 CT 551, 552, 555), but the court referenced undefined "unique facts and circumstances" that purportedly render this particular controversy non-justiciable. *See* 12 CT 3141:12-13. This conclusion is erroneous: Not only can one agency of a public entity sue another agency as a matter of law, but the facts and circumstances in the present case are not "unique." Rather, the California Supreme Court has recognized that one city agency may assert claims against another agency ***under California's debt limit laws***. *See City of Pasadena v. McAllaster* (1928) 204 Cal. 267, 269 (in a suit between the City of Pasadena and the Pasadena city attorney, the city attorney

asserted that California's debt limit laws prevented the City from proceeding with a condemnation and improvement project).

Rather than bolstering the trial court's conclusion with viable case law—or perhaps because there is no such case law—the Unions attempt to undermine the City's reliance upon *City Council v. McKinley* (1978) 80 Cal.App.3d 204. In *McKinley*, the City Council sought to compel the City Manager and the City Auditor and Comptroller, both departments of the City, to execute a landscape design contract. *Id.* at 207; *see* S.D. Muni. Code § 22.1801(b) (offices of City Manager, Auditor and Comptroller are departments of the City). In attempting to distinguish *McKinley*, the Unions venture beyond the issue at hand—whether one public agency may sue another—instead contending that because there has been no illegal action by SDCERS, there cannot be a justiciable controversy. RB at 105. That assertion is simply irrelevant: The Unions cannot credibly dispute that one city agency may sue another simply by assuming that SDCERS will eventually prevail.

3. As The Entity That Caused The City To Incur The Unlawful Debt, SDCERS Is The Proper Defendant

The Unions next argue that SDCERS could not have violated the debt limit laws and therefore is not a proper defendant because the creation of pension benefits is a legislative function, which SDCERS is not authorized to perform. RB at 100 (SDCERS "has no power to set or rescind benefits as this power rests exclusively with the City.") The undisputed evidence demonstrates the fallacy of

this argument: While SDCERS may have had no legal authority to set benefits, enabling benefit increases is precisely what the SDCERS Board did in approving MP I and MP II. RB at 7-10, 21-22. The entire scheme—including the benefit increases—was entirely contingent on SDCERS' approval of the funding relief. 12 CT 3121:20-22. As the trial court found, "***the City produced extensive evidence in Phase One of the trial that shows the City's grant of benefits in MP 1 and MP 2 were contingent upon the grant of funding relief by the SDCERS Board.***" 12 CT 3144:24-26 (emphasis added).

Far from exonerating SDCERS, the Unions' argument concedes the ultimate merit of the City's position. Reduced to its essentials, ***the Unions' argument is that SDCERS acted ultra vires in approving benefit increases and therefore SDCERS cannot be sued for violating the law because it had no authority to act as it did.*** That concession that SDCERS had no authority to increase employee benefits, and that it erred in coupling benefits with underfunding, does not relieve SDCERS from liability; it ***establishes*** SDCERS' wrongdoing.

In addition, the unlawful debt did not arise merely from the creation of new benefits; it also arose from the permission to underfund the pension system, thereby increasing unfunded City liability. There can be no question that SDCERS is legally responsible for system funding: The California Constitution provides that "[t]he retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public

pension." Cal. Const., art. XVI, § 17(a). By allowing system underfunding in breach of that fiduciary duty, as well as by increasing benefits without a current funding source, the SDCERS Board violated the debt limit laws, subjecting SDCERS to declaratory relief. *E.g.*, *POB*, *supra*, 152 Cal.App.4th at 1390 (issuing declaratory relief re invalidity of agency's creation of unfunded pension liability).

Finally, SDCERS is also a proper defendant because it is the party that makes the payments on the unlawful debt. SDCERS has the responsibility for "administer[ing] the system and ***pay[ing]*** the benefits." 12 CT 3140:26-27 (emphasis added). In an action under California's debt limit laws, "[t]he liability of the City generally to feed the fund from which the [debt is] to be paid is the vital point." *City of Pasadena v. McAllaster*, *supra*, 204 Cal. at 275.

4. The *Gleason* Settlement Is Irrelevant To SDCERS' Debt Limit Law Liability

Completely ignoring its own findings as to SDCERS' role in creating the illegal benefits, the trial court held that "[t]he responsibility of SDCERS in the transaction was ***to allow the underfunding***. Yet, the underfunding allowed by SDCERS has already has been set aside in the *Gleason* settlement. Therefore, the portion of the transaction that involves SDCERS and its alleged contribution to the debt has already been undone." 12 CT 3142:5-10 (emphasis added). As shown in the Opening Brief, this is clear error: The trial court's finding that the 2004 *Gleason* settlement ***prospectively*** ended the underfunding of the pension system is

totally irrelevant to whether, in 1996 and again in 2002, the debt limit laws were violated when SDCERS "allow[ed] the underfunding" enabling the contingent benefit increases and thereby creating the unlawful debt in the first instance. The debt limit laws plainly prohibit the ***creation*** of debt without corresponding revenue, *see* Cal. Const., art. XVI, § 18(a) ("No . . . city . . . shall ***incur*** any indebtedness . . .") (emphasis added). Prospective termination of only the underfunding portion of the floating debt is irrelevant.

More importantly, it is obvious that the unlawful debt has not been terminated by *Gleason* or otherwise. Not only is the system still woefully underfunded, 25 RT 4580:1-27, 4581:3-8; *see also* Exs. 1446.6-1446.8, but the benefit increases illegally installed in MP I and MP II are being claimed as valid by the Unions, and paid by SDCERS, to this day. *E.g.*, 1 CT 212:11-14; 1 CT 174:21-23, 26-28; 1 CT 139 (¶ 4); 1 CT 189:11-12; 1 CT 141:24-26; Ex. 2188 ¶¶ 3, 4; Ex. 2190 ¶ 17; *see also* 11 CT 2746:20-22 (summary judgment for SDCERS that it may continue paying benefits while this case is litigated).

5. The City's Debt Limit Law Claims Are A Proper Subject For Declaratory Relief Against SDCERS

A declaratory action properly determines the parties' "rights and duties . . . , including a determination of ***any question*** of construction or ***validity*** arising under the instrument or contract." Cal. Civ. Proc. Code § 1060 (emphasis added); *see also East Bay Mun. Utility Dist. v. Dep't of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1121. Whether a public entity has violated the law is a

proper subject for declaratory relief. *See California Alliance for Utilities Safety and Educ. v. City of San Diego* (1997) 56 Cal.App.4th 1024. In that case, the court held that the parties' antithetical positions regarding whether the City had complied with the relevant laws was a controversy, and "[o]n that basis alone, plaintiffs are entitled to declaratory relief resolving the controversy." *Id.* at 1030; *see also POB, supra*, 152 Cal.App.4th at 1390; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723.

Faced with this authority, which they cannot challenge, the Unions rely upon *City and County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, suggesting that the City is pursuing this litigation for its "gratification" or "curiosity" because the City's sole purpose is to settle the rights of third persons who are not parties. RB at 102 (quoting *Boyd, supra*, 22 Cal.2d at 694). *Boyd* is completely off point: It simply pertained to whether a lawsuit was ***collusive***, whereas the City has a direct and ***adverse*** interest in obtaining a declaration that SDCERS' actions are unlawful. In addition, *Boyd*'s discussion of this issue is pure dicta. *See Boyd, supra*, 22 Cal.2d at 694 ("This is not such a case.").

The Unions next cite *Salazar v. Eastin* (1995) 9 Cal.4th 836, for the proposition that "[w]hen persons who are most likely to challenge a request for declaratory relief are not before the court, any opinion rendered is advisory and not within the court's function or jurisdiction." RB at 102-03 (purporting to quote *Salazar, supra*, 9 Cal.4th at 860). In reality, *Salazar* merely states that "[t]he rendering of advisory opinions falls within neither the functions nor the

jurisdiction of [the] court," *Salazar*, *supra*, 9 Cal.4th at 860 (quoting *People ex rel. Lynch v. Super. Ct.* (1970) 1 Cal.3d 910, 912), an observation rendered inapt by the Unions' own invocation of the court's jurisdiction and allegations of a live controversy:

- MEA, in its Complaint in Intervention states, "MEA supports the relief requested by Plaintiff SDCERs and opposes any claim that pension benefits heretofore adopted by the City Council, as codified in the San Diego Municipal Code, are 'illegal or void'. . ." 1 CT 174:26-28 (MEA Complaint in Intervention, Ex. 2190 at 1). In MEA's prayer it requests "[t]hat all pension benefits being paid by SDCERS pursuant to amendments to the San Diego Municipal Code made effective on and after January 1, 1997, be declared lawful." 1 CT 185:16-17 (MEA Complaint in Intervention, Ex. 2190 at 12).

- Local 127, in its Complaint in Intervention, prays for "a judicial determination that all City Retirement benefits, including but not limited to the Contested Benefits as defined in paragraph 22 of the Complaint are lawful and enforceable in all respects." 1 CT 142:20-22 (Local 127 Complaint in Intervention, Ex. 2189 at 4).

- Local 145, in its Complaint in Intervention, prays "that this Court render a judicial determination on SDCERS's First Cause of Action that SDCERS may properly and legally pay all City Retirement Benefits, including, but not limited to, the Contested Benefits, as enacted pursuant to the action alleged in paragraphs 16 through 19 of SDCERS's Complaint, and pursuant to all City Pension Benefit Ordinances approved and adopted thereunder." 1 CT 195:14-18 (Local 145 Complaint in Intervention, Ex. 2188 at 4).

- The *Abdelnour* Plaintiffs' Complaint pleads "[p]ursuant to California Code of Civil Procedure section 1060, Plaintiffs request a judicial determination that SDCERS may properly and legally pay all of the Contested Benefits . . . ." 1 CT 212:11-14 (*Abdelnour* Complaint ¶ 20).

Declaratory relief will determine whether MP I and MP II are void and whether SDCERS may lawfully continue paying benefits using City funds to do so (as it and the Unions contend)—a question MEA, Local 145, Local 127 and the *Abdelnour* Plaintiffs asked the trial court to resolve. *E.g.*, 1 CT 73:16-17; Ex. 2187.10 ¶ 18; Ex. 2187.11 ¶ 24 ("[A] judicial determination is necessary and appropriate at this time so that the parties can ascertain their respective rights and duties").[9]

The debt limit laws are important constraints on government's ability to incur unfunded obligations without voter approval. *POB*, *supra*, 152 Cal.App.4th at 1398 (purpose was to "end . . . the practice common at the time among local governments of incurring liabilities in excess of income in order to finance extravagance, thereby creating a floating debt to be repaid from the income of future years."). None of the purported procedural barriers to justiciability should prevent examination of this claim.[10]

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[9] While the Unions also argue that SDCERS' stipulation to abide by the outcome of this case makes any decision advisory, SDCERS' agreement as to the fate of its ***own*** claims is irrelevant: The City still wishes to pursue ***the City's*** cross-complaint ***against SDCERS***. In all events, the Unions' complaints in intervention—seeking contrary relief to the City—unquestionably remain pending against the City. Those complaints join the Unions ***in place of SDCERS***. *See Timberidge Enters., Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 879 (an intervening party is to be regarded as a plaintiff or as a defendant in the action depending upon the party for whose success he seeks to intervene).

[10] The Unions also try to capitalize on the City's dismissal of its mandamus claim against SDCERS. In fact, that claim was superfluous and properly dismissed because a writ is not necessary where a government body is obligated to comply with the law, as this Court recently recognized. *County of San Diego v.*

C. THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACTION COULD NOT PROCEED UNLESS NECESSARY PARTIES WERE JOINED

1. The Absent Parties Are Not Necessary Parties Under Section 389

Misconstruing the City's position, the Unions argue that "the City urges [the court to authorize the use of Section 389] in this action to *exclude* absent parties . . . ." RB at 82. The City does not seek to ***exclude*** any absent individual beneficiary: Indeed, since the trial court granted the motions of the Unions and the *Abdelnour* Plaintiffs to intervene in support of SDCERS ***not one other employee or pension beneficiary has sought to intervene in this case***. Rather, since their intervention, the Unions and *Abdelnour* Plaintiffs have been co-parties with SDCERS, *see Timberidge Enters., Inc. v. City of Santa Rosa, supra*, 86 Cal.App.3d at 879, and they have been full participants and vigorous advocates for the singular, common interest of both the existing and the absent parties. As shown below, because they are adequately represented, the absent parties are not necessary to proceed in this declaratory judgment action; they would be proper parties if they sought to intervene, but they have not.[11]

State (2008) __ Cal.Rptr.3d __ [2008 WL 2582976].

[11] The Unions incorrectly argue that the "City sidesteps the trial court's conclusions under section 389(a)(2), focusing instead on section 389(a)(1) to argue that 'complete relief *can* be accorded among those already parties.' (AOB at 41 and 44)." RB at 80. To the contrary, at page 44 of the City's Opening Brief, the City quotes California Code of Civil Procedure ("CCP") Section 389(a)(2)

a. Absent Parties Are Not Necessary Where They Are Adequately Represented By The Existing Parties

An absent party whose interests are adequately represented is not a necessary party under Section 389(a). *See Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 161 (allowing nonjoinder of absent property owner where owner's interests were adequately represented and "essentially the same" as the existing party).[12]

When an absent party's litigation objective is duplicative of the objective of an existing party, ***this reason alone*** establishes that the interests of the absent party are adequately represented. *Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1103. In *Deltakeeper*, a plaintiff environmental lobbyist group named three defendants in a lawsuit contending that an environmental impact report (EIR) was non-compliant with the California Environmental Quality Act. *Id.* at 1095-96. An adequate EIR was a precondition to enforcement of a

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verbatim and then for the next ten and a half pages details why the absent parties' ability to protect their interest is not impaired or impeded, and why such absent parties are not subject to any risk, substantial or otherwise, of incurring inconsistent obligations by reason of their claimed interest. The City hardly sidestepped CCP Section 389(a)(2).

12 *See also Las Virgenes Educators Assn. v. Las Virgenes Unified School Dist.* (2001) 86 Cal.App.4th 1, 15 (holding interested absent party parents were not necessary parties under Section 389(a) where existing party school district, "although not in precisely the same position as the parents, [has] protected the parents' interests . . ."); *Countrywide Home Loans v. Super. Ct.* (1999) 69 Cal.App.4th 785, 795-96 (where absent party "share[d] the same goal with respect to the outcome of the litigation" as existing defendants, absent party was not necessary under Section 389(a) because the absent party's "interests are less likely to be impaired or impeded").

contract benefiting the named defendants ***and other interested but absent parties***. *Ibid.* The case proceeded without the absent parties because they and the existing parties had a shared, singular interest in upholding the precondition to enforcement of the contract and therefore they were not necessary. *Id.* at 1102.

b. The Absent Parties And Existing Parties Share One Singular Interest: Upholding The Legality Of MP I And MP II

At its core, the City's Fifth Cross-Complaint ("5ACC") contained one question: whether MP I and MP II violated debt limit and conflict of interest laws and are therefore illegal and void. *See, e.g.*, 4 CT 945, 958-59; 12 CT 3050:9-10. In this action, the Unions and the *Abdelnour* Plaintiffs (who represent retired persons and non-union personnel) have a singular and shared interest with the absent parties—protecting the pension benefit increases granted via MP I and MP II. That interest is being adequately—not to mention vigorously and vociferously—represented by each of the intervenors.[13]

Indeed, as discussed *infra*, the Unions' representation of the absent beneficiaries is so complete, that the Unions have asserted (and prevailed upon) *res judicata* arguments that only the beneficiaries and not the Unions may assert. Specifically, the Unions have asserted that the *Gleason* settlement bars the City's claims because the City failed to assert a compulsory cross-complaint against the

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[13] This question is decided de novo. *See People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 875.

Gleason Plaintiffs, who included most pension beneficiaries, but ***not*** the Unions. AOB at 81. The Unions cannot have it both ways: representing absent parties to such an extent that the Unions are asserting those parties' rights separate and independent from the Unions' own, while denying that the absent parties are represented. *Accord* RB at 56 (Unions asserting absent parties' statute of limitations defense).

In reality, the interest of the existing adverse parties and the absent parties is exactly aligned. The City seeks to set aside MP I and MP II as illegal and void. *See* 4 CT 945; 4 CT 958 (¶ 67); 4 CT 959 (¶ 70). On the other side, the Unions and other intervenors universally seek to uphold MP I and MP II as legal and valid. *See, e.g.*, 1 CT 174:26-28 (MEA's Complaint in Intervention) ("MEA . . . opposes any claim that pension benefits heretofore adopted by the City Council . . . are 'illegal or void'. . . ."); 1 CT 185:14-15 (requesting declaration that "all pension benefit improvements . . . be declared lawful"); 1 CT 205, 214:15-18 (*Abdelnour* Plaintiffs' First Amended Complaint for Declaratory Relief) (seeking judicial determination that "SDCERS may properly and legally pay all City Retirement Benefits"); 1 CT 139, 141:24-26 (Local 127's Complaint in Intervention) (seeking declaration that SDCERS may "properly and legally pay all City Retirement benefits"); Ex. 2188.3 (¶ 6) ("The Contested Retirement Benefits were not enacted in violation of Government Code Section 1090"). The identical interest therefore is shared by the "approximately 6,000 City employees" represented by existing party MEA, 1 CT 175:1-8 (MEA Complaint ¶ 1), by the

remaining *Abdelnour* Plaintiffs, by the individuals represented by existing party Local 145, by the individuals represented by existing party Local 127 and by each and every absent party. The Unions have not shown otherwise.

While the Unions try to avoid their complete alignment with the beneficiaries by contending that the City is only challenging some MP I and MP II benefits (and therefore there is a potential conflict between groups of beneficiaries), that is incorrect. *See* 12 CT 3050:9-10 ("The 5ACC seeks a judicial determination that MP 1 and MP 2 are illegal and void."). Moreover, the City's position is irrelevant; as shown, the Unions and *Abdelnour* Plaintiffs adequately represent all of the absent parties because they uniformly support all benefits.

Because the intervenors unquestionably represent the pension beneficiaries' unified interest in upholding MP I and MP II, the intervenors are adequate representatives of all pension beneficiaries, who therefore are not necessary parties under Section 389(a).

c. The Unions' Authorities Do Not Render The Absent Parties Necessary To This Case

The Unions' authorities—which largely echo their debt limit law arguments—are not to the contrary. The Unions first cite to *City and County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, 693-94, for the proposition that

> [a]n action not founded upon an actual controversy between the parties to it, but which is brought for the purpose of securing a determination of a point of law for the gratification or the curiosity of the litigants, or the sole object of which is to settle the rights of third

> persons who are not parties, is collusive and will not be entertained.

RB at 74-75. The *Boyd* court was confronted with a situation where an absent party's interest was resolved ***without the benefit of adequate representation.***[14] This is not that case. Indeed, *Boyd* did not even discuss Section 389, focusing solely upon whether the lawsuit was collusive. *Id.* at 695.

The Unions also again rely on *Salazar v. Eastin* (1995) 9 Cal.4th 836, claiming that "when persons who are most likely to challenge a request for declaratory relief are not before the Court, any opinion rendered is advisory and not within the Court's function or jurisdiction." 12 CT 3039:7-10; RB at 75. *Salazar* provides no more support to the Unions' arguments concerning necessary parties than it did to their arguments concerning the debt limit law. In *Salazar*, the court declined to confirm the California State Board of Education's power to promulgate certain regulations because such a ruling would be an advisory opinion falling outside the functions and jurisdiction of the California Supreme Court. 9 Cal.4th at 860. ***After*** this observation (and in dicta), the court noted that promulgating a ruling ***would not be wise*** because the interests of local school districts that would be most likely to challenge such a ruling ***were not represented***

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[14] In *Boyd*, the city and county of San Francisco sought a writ of mandamus to compel the city controller to pay city-approved wages to municipal railway employees, who were not parties to the suit. *Boyd*, 22 Cal.2d at 687. Finding an actual controversy, the court held that the controller would be "acting in violation of his public duty if he authorized payment of claims that involved an illegal expenditure of public funds . . . . His right to approve the payments had been challenged in a suit. A real controversy therefore existed . . . ." *Id.* at 694.

in the lawsuit. *Ibid.* Thus, *Salazar* has no bearing where, as here, the absent parties' interests are represented. Moreover, *Salazar*'s discussion of absent parties is fundamentally irrelevant here because *Salazar* examined the wisdom of rendering an advisory opinion, not the necessary party question under Section 389.

The Unions' reliance upon *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, is similarly misplaced. In *Korean Philadelphia*, a complicated case involving a dispute between a church and the organizations above it in its religious hierarchy, the court declined to pass on several issues: "Finally, neither we nor the trial court can give advisory opinions *or* resolve disputes over matters which involve parties not before us even if the parties are united in their desire to have the court resolve unripe issues or claims which the parties have no standing to assert." *Korean Philadelphia*, 77 Cal.App.4th at 1081 (emphasis added). ***No party*** in *Korean Philadelphia* had standing because only corporate shareholders, officers and directors have standing, and all parties were corporate outsiders. *Id.* at 1083. Here, unlike *Korean Philadelphia*, all parties have standing (as the unions expressly pleaded), the absent parties' interest is entirely aligned with that of the Unions and their interests have been vigorously represented.

The Unions cite *Tuller v. Super. Ct.* (1932) 215 Cal. 352, for the proposition that the court is "duty-bound" with a "non-discretionary duty" to order the absent parties be made parties in order for the case to proceed, RB at 79-80, an argument squarely at odds with the inquiry as now framed by amended Section

389, which gives the court discretion to proceed, even in the absence of necessary parties. *See* Cal. Civ. Proc. Code § 389(b) (court shall determine if action should proceed in absence of necessary party); *ibid.* (Law Rev. Comm. Comments to 1971 Amendments). To the extent it is even instructive given the evolution of the law under Section 389, *Tuller* stands for the narrow proposition that when a court sustains a demurrer concluding an absent party is a necessary party, it necessarily follows that the court must ***permit*** the joinder of that party. *Tuller,* 215 Cal. at 355. "No discretion resided in the court ***in this state of the record.***" *Ibid.* (emphasis added).

Finally, the Unions cite *Silver v. Los Angeles County Metropolitan Transp. Authority* (2000) 79 Cal.App.4th 338, for their assertion that each absent individual participant in a pension plan is a necessary party under Section 389(a). RB at 85-86. Unlike in this case, in *Silver*, the absent Public Transportation Services Corporation (PTSC) employees had no shared interest with any existing party. ***Only*** the PTSC employees stood to lose their benefits under the lawsuit and no existing party shared the absent PTSC employees' interest in keeping their benefits. *Silver* is therefore inapposite to this case, where the absent parties' interest is singular and identical with that of the existing parties. *Silver* merely held that the trial court did not abuse its discretion in weighing several considerations (not present here) and concluding that employees were indispensable parties. *Silver, supra,* 79 Cal.App.4th at 349-50.

d. The Absent Parties Are Represented By The Intervenor Unions By Law

In addition to serving as adequate absent party representatives given their aligned interest with the beneficiaries, the Unions represent the interests of their members by law. Given their representative nature, unions uniquely have standing to sue and to obtain binding determinations on behalf of their individual members. *See Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of America. v. Brock* (1986) 477 U.S. 274, 287-90 (unions had standing to litigate the legality of legislation impacting union members, even without the joinder of the members in the lawsuit because the lawsuit turned upon a question of statutory interpretation); *see also Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 284 ("[Plaintiff union's] members are all employees of the fire department and as such have a clear beneficial interest in the subject matter of the complaint. ***Its interest is joint with theirs.***") (emphasis added).

Here, the Unions specifically allege that they represent the pension beneficiaries' interests:

- In its Complaint, MEA alleged that "MEA has negotiated a series of labor agreements, known as 'Memorandum of Understanding' (MOUs), with the City of San Diego on behalf of approximately 6,000 City employees . . . ." 1 CT 175:1-8 (MEA Complaint ¶ 1).

- Local 127 alleged that "Local 127 and the City have negotiated a series of Memorandum of Understanding MOUs), prescribing the terms and conditions of employment for employees in the Unit." 1 CT 141:4-6 (Local 127 Complaint ¶ 3(b)).

- Local 145 alleged in its Complaint that "the benefits negotiated by Local 145 in its Memoranda of Understanding with the City of San Diego are at stake in the Action . . . . Local 145 is the only entity authorized by law to represent the employment interests of firefighters." 1 CT 190:12-18 (Local 145 Complaint ¶ 3(e)).

- The 190 *Abdelnour* Plaintiffs allege that they represent "individual City of San Diego retired employees, individual members of the City of San Diego unclassified service, or individual existing City of San Diego employees unrepresented by a labor union . . . ." 1 CT 205:7-12 (*Abdelnour* Complaint ¶ 1).

In the face of these admissions of representation, the Unions offered no evidence showing that they do not represent the individual beneficiaries; indeed, the evidence was overwhelmingly to the contrary. For example, Firefighter John Thompson testified in response to the question whether the 1300 individual members of the Firefighters Union are in "some way a party to this case," "I guess we all are as far as benefits." 10 RT 1036:7-12. Mr. Thompson testified that counsel for the Union was protecting the individual members' interests in this litigation. 11 RT 1090:4-12. Similarly, former MEA President Judith Italiano testified that the MEA members "are relying on us protecting the language that we fought for, that talks about their retirement benefits." 19 RT 3066:18-27. The MEA has told its members that the Union is looking out for their interest in this litigation. 19 RT 3063:27-3064:8.

Indeed, the Unions' representation of ***all beneficiaries*** in this case is apparent: The Unions are the parties who negotiated and signed the various

MOUs incorporating the MP I and MP II contracts. Because the beneficiaries' claim to benefits is based solely on MOUs negotiated for them by the Unions, and which the Unions currently seek to enforce, the Unions necessarily represent their interests. *See* AOB at 44-45.

Whether MP I and MP II (and corresponding MOUs) are valid is a question of law and the circumstances of any individual party are irrelevant to its answer. When declaratory relief is sought, raising a pure question of law, a union can litigate the matter "***without the participation of the individual claimants*** and still ensure that the 'the remedy, if granted, will inure to the benefit of those members of the association actually injured.'" *See B'hood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal.App.3d 1515, 1523 (*quoting United Auto. Workers v. Brock* (1986) 477 U.S. 274, 288).

While the Unions cite *Phillips v. State Personnel Board* (1986) 184 Cal.App.3d 651, 660, *disapproved on other grounds, Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123 n.8, for the proposition that unions "cannot bargain away nor ***waive*** employees' individual constitutional rights," RB at 79, here, by contrast, the Unions are ***advocating*** for their employees' interests, not waiving them. *Phillips* does not address, much less establish, that a union cannot represent its members in a lawsuit involving pension benefits.

The Unions also erroneously focus on the Unions' designation as cross-defendants (instead of plaintiffs). RB at 80-81. The trial court noted, however,

that the Unions have standing and have participated in this litigation specifically to enforce their collective bargaining agreements under Labor Code Section 1126. 12 CT 3040:19-21. Nothing in Section 1126 even remotely intimates that unions cannot suffer adverse results in the litigation of rights under a collective bargaining agreement. Indeed, California law is clear that unions which have the standing to litigate on behalf of their members may experience adverse as well as favorable decisions, particularly where, as here, the relief sought is equitable. *See* AOB at 51-52 (citing multiple cases ignored by Respondents); *see also Armstrong v. Super. Ct.* (1916) 173 Cal. 341 (holding unnamed union members "are bound" by an injunction issued against the named defendant union); *Herald v. Glendale Lodge No. 1289* (1920) 46 Cal.App. 325 (an injunction issued against a named association defendant is "operative against all [unnamed] members . . .").

At bottom, relying upon artificial procedural distinctions, the Unions attempt to achieve a "no-lose" status in this litigation—they can prevail on behalf of themselves and pension beneficiaries as plaintiffs in this case, but they cannot lose as defendants. The Unions obviously cannot have it both ways—they cannot actively intervene and claim standing in order to establish the validity of the employees' benefits under MP I and MP II and then successfully disavow their capacity to be bound by an adverse result.

2. Even If The Absent Parties Are Necessary Parties, Those Parties Are Not Indispensable

Even assuming its necessary party finding was correct, the trial court abused its discretion in failing to determine whether the absent parties were indispensable to the action under Section 389(b). Analysis under Section 389(b) occurs when a person who has been deemed a necessary party for the purposes of Section 389(a) "cannot be made a party." Cal. Civ. Proc. Code § 389(b). The trial court erroneously interprets Section 389(b)'s "cannot be made a party" qualification as a dictate that analysis under that section is not undertaken if the absent parties are known and subject to service of process. 12 CT 3041:5-7. In reality, it is within a court's discretion to proceed without absent but necessary parties where it is impracticable to bring those parties into the action. *Leonard Corp. v. City of San Diego* (1962) 210 Cal.App.2d 547, 551 (holding parties should be joined "unless it is impossible to find them, or impracticable to bring them in."); *see also People ex rel. Lungren, supra*, 56 Cal.App.4th at 875-76 ("It is for discretionary and equitable reasons, not for any want of jurisdiction, that the court may decline to proceed without the absent party.") (quoting *Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 368).

Section 389 is based in equity and "is limited and qualified by considerations of fairness, convenience, and practicability." *Bank of Calif. v. Super. Ct.* (1940) 16 Cal.2d 516, 523. It should not be converted into a rule preventing justice. *Id.* at 521. Mandating the joinder of thousands of individual

beneficiaries to determine the answer to one straightforward and purely legal question in which the interest of the absent parties is exactly aligned with that of the existing parties is unnecessarily inconvenient and extremely impracticable. It is not required. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1026-27 (the joinder of thousands of individual beneficiaries is not required "where the beneficiaries are very numerous, so that the delay and expense of bringing them in becomes oppressive and burdensome").

It is to the benefit of every interested party in this lawsuit for a prompt resolution of this matter, as the Unions specifically have pleaded. AOB at 55 n.14. All parties and the court have committed enormous resources to this lawsuit and the unnecessary joinder of additional parties would only increase the total costs of litigation. Under these circumstances, the trial court abused its discretion by refusing to consider the City's claims in the absence of non-joined parties. *Accord Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 213-14 (even without joinder of absent necessary parties (insurance companies not adequately represented by existing parties), court could still issue declaratory judgment on violation of conflict of interest law under Section 1090).

D. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE *CORBETT* SETTLEMENT BARS LITIGATION AS TO THE LEGALITY OF MP I BENEFITS

1. The *Corbett* Settlement Is Reviewed De Novo

Contrary to the Unions' argument, the trial court's interpretation of the *Corbett* settlement agreement is reviewed de novo. It is "solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." *Parsons v. Bristol Devel.* (1965) 62 Cal.2d 861, 865. Here, the trial court's interpretation of the *Corbett* judgment turned on the terms of the judgment. *See* 12 CT 3131:1-2 ("The position of the City in this litigation is not supported by the evidence of the intent of the parties from the *Corbett* Judgment itself.").[15]

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[15] *See also* 12 CT 3130:12-13 ("[T]he intention of the parties is to be derived from the language of the agreement itself."); 12 CT 3131:7-10 ("This clearly contradicts the evidence of the intention of the parties from the Judgment itself, as well as the City's own witnesses who testified the case settled for increased retirement benefits."); 12 CT 3131:13-16 ("[T]his position means the Court must ignore those portions of the *Corbett* Judgment which give current employees an option to take a new increase percentage 'retirement factor.'"); 12 CT 3131:20-23 ("[T]he Judgment had to be based on the benefits the retired were already receiving at the time to make the Judgment internally consistent."); 12 CT 3132:14-17 ("The approach was not supported by the evidence presented of the clear intention of the parties from the settlement documents themselves, or the circumstances existing at the time of settlement."); 12 CT 3132:17-19 ("The *Corbett* Judgment itself clearly states the settling parties are receiving increased retirement benefits and the convoluted mathematical calculation necessary to segment them out is contradicted by the plain meaning of the terms of the Judgment."); 12 CT 3132:20-23 ("The most reasonable interpretation of the Judgment that accords with the wording of the Judgment itself and the facts in existence in May of 2000 is that new retirement benefits were created in

Furthermore, even had the Unions identified some conflicting extrinsic evidence, de novo review—rather than substantial evidence review—would remain appropriate unless the Unions established two elements: (1) that the trial court's "interpretation turn[ed] upon the credibility of extrinsic evidence," *Parsons v. Bristol Devel., supra,* 62 Cal.2d at 865; and (2) that "the foundational extrinsic evidence is in conflict." *Med. Operations Mgt. v. Nat. Health Labs.* (1986) 176 Cal.App.3d 886, 891; *see also id.* at 891-92 (de novo review appropriate even when conflicting inferences arose from extrinsic evidence). These requirements are not satisfied merely when multiple witnesses testify as to their differing interpretations of an agreement. *See Am. President Lines, Ltd. v. Zolin* (1995) 38 Cal.App.4th 910, 924.[16]

The Unions have not established these prerequisites to substantial evidence review, citing to no conflicting extrinsic evidence or credibility questions. *See* RB at 59. Instead, the Unions themselves argue the correct interpretation of the *Corbett* judgment based upon its plain language and terms. RB at 60, 62-63. Because the trial court interprets the *Corbett* judgment based largely upon its

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Corbett.").

[16] *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 847, is inapposite. *Benach* involved a contract dispute where "[b]oth parties presented extrinsic evidence that [disputed] terms and others may be subject to various meanings" and "the court considered voluminous amounts of frequently contradictory extrinsic evidence to aid its interpretation of key contract terms." *Id.* at 848. Here, to the limited extent that the trial court discussed extrinsic evidence at all, there is no suggestion in the court's *Corbett* decision that the evidence was in conflict or that there were questions of credibility that the court resolved.

language, and because the trial court only briefly mentions extrinsic evidence, does not find a conflict in the evidence, and does not suggest there is a question of credibility, this Court reviews de novo. *Med. Operations Mgt. v. Nat. Health Labs.*, *supra*, 176 Cal.App.3d at 892.

2. The Unions Wholly Fail To Confront The City's Central *Res Judicata* And Ratification Arguments

In a telling omission, the Unions simply ***do not address*** the City's lengthy *res judicata* and ratification arguments demonstrating the error in the trial court's finding that the *Corbett* settlement precludes adjudication of the legality of MP I. The Unions instead summarily seek to avoid the merits by asserting that the City's points are "nonsense." RB at 65. As the Unions' inability to address the merits confirms, the absence of any legal basis for finding a bar based on the *Corbett* settlement under *res judicata*, ratification or any other theory is dispositive.

a. The *Corbett* Settlement Does Not Bar The City's Claims Under Preclusion Principles

Neither claim preclusion nor issue preclusion bars the City's claims. *See* AOB at 58-63. The trial court incorrectly applied claim preclusion when it found "any claims based on pre-*Corbett* [MP I] benefits have been ***merged*** in the *Corbett* judgment." 12 CT 3132:26-28 (emphasis added). Claim preclusion does not apply because the cause of action in *Corbett* admittedly had nothing to do with either conflict of interest or debt limit laws and thus did not involve the same claim as the City's claim in this case. *See, e.g., Lincoln Property Co., N.C., Inc. v.*

Travelers Indem. Co. (2006) 137 Cal.App.4th 905, 912-13 *see also* RB at 14 ("No party in the *Corbett* case challenged the legality of the benefits enacted in 1997.").

The trial court also incorrectly applied the doctrine of issue preclusion when it found "the City is ***estopped*** from pursuing claims which seek to invalidate such benefits." 12 CT 3133:3-5 (emphasis added). Issue preclusion (or collateral estoppel) does not apply because none of the City's current claims was actually litigated in *Corbett*. *See, e.g., Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 224.

b. The *Corbett* Action Did Not Validate, Ratify Or Cure MP I

The trial court's finding that the *Corbett* settlement precludes the City's current challenge to MP I also cannot be justified under principles of ratification. Indeed, the Unions explicitly concede that the *Corbett* judgment did not validate, ratify, or cure the illegally conferred MP I benefits. RB at 64. The Unions suggest in their "Statement of Facts," however, that the illegality of MP I was cured by new MOUs in 1998, which "replaced" the "expired" MP I MOUs. RB at 12. That assertion is both factually incorrect and legally impossible.

First, as a factual matter, as shown at length in the Opening Brief, the illegal benefit increases adopted in MP I were not superseded by "new" benefits in 1998; rather, each new agreement built on MP I benefits, without examining the illegality of MP I. AOB at 66-75; *see also* RB at 12 ("***existing*** wages and benefits, including the MP 1 benefits, were the 'starting point' from which these [1998]

negotiations proceeded") (emphasis added). MP I benefits remain part of the benefit package available to City employees, even today. AOB at 71-72.

Second, as a legal matter, even if the 1998 MOUs purported to ratify MP I benefits without curing the prior illegality (which they did not), neither ratification, waiver nor estoppel will validate an illegal and void contract. Because MP I was illegal and hence void *ab initio*, it could not be ratified in a subsequent contract as a matter of law. *See Berka v. Woodward* (1899) 125 Cal. 119, 129 (the fact that claim was allowed by the council did not give it validity that it did not otherwise possess; contract based on conflict of interest was void); *see also City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal. 2d 267, 274 ("A party to an illegal contract cannot ratify it, cannot be estopped from relying on the illegality, and cannot waive his right to urge that defense.").[17]

Accordingly, ratification also will not support the trial court's ruling as to *Corbett*'s preclusive effect.[18]

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[17] *See also* AOB at 63-65; 17A Am. Jur. 2d *Contracts* § 308 (2006) ("A contract that is void as against public policy or statute cannot be made valid by ratification"); 10A Eugene McQuillin, The Law of Municipal Corporations § 29.104.30 ("Contracts which a municipal corporation is not permitted legally to enter into are not subject to ratification"; no ratification of contract that is contrary to declared public policy).

[18] The notion that the 1998 MOUs supersede MP I is also wholly inconsistent with the trial court's decision that the City ***could*** proceed as to MP II, at least against non-*Gleason* Plaintiffs. MP II, too, was accompanied by new MOUs. 12 CT 3151:25-3152:1. This point, *see* AOB at 66, was ignored by the Unions.

3. None Of The Unions' "Interpretive" Arguments Has Merit

Unable to challenge the City's showing that there is no legally cognizable basis for a finding that *Corbett* has preclusive effect under either *res judicata* or contract ratification principles, the Unions resort to the same "interpretive" arguments they sold to the trial court—that the terms of the *Corbett* settlement somehow supersede MP I. These arguments are nothing different than an alternative argument of ratification, which will not cure the defect. And, in all events, the assertions that *Corbett* eclipsed MP I fail as a matter of law based on the language of the documents in question and the uncontradicted evidence.

a. The MP I Benefits Survived The *Corbett* Settlement And Are Still In Place To This Day

The Unions' primary argument is that the *Corbett* settlement (and related MOUs) displaced MP I by adopting a new "top to bottom" benefit structure, in lieu of the MP I benefits. RB at 58 (arguing MP I benefits were "replaced" by *Corbett* benefits). That argument simply does not work: *Corbett* involved only the issue of whether employees were entitled to an incremental benefit enhancement based on the so-called *Ventura* benefits, and the settlement therefore provided only for an ***increase*** in benefits on top of those already in place under MP I, as the trial court repeatedly recognized. AOB at 69-70; *see also* RB at 60-61 (Unions admit that in *Corbett* Settlement "plaintiffs received certain ***increased*** retirement benefits") (emphasis added).

To implement this increase, the *Corbett* Settlement allowed for plan participants to select from two alternative retirement formulas: (1) a new increased retirement factor, or (2) the retirement factor in effect as of June 30, 2000—following the MP I formula—plus a percentage increase. For example, upon retirement, safety members could select either an increase in their retirement factor multiplier from 2.5 to 3.0 (at age 50), or, as an alternative, the plan participant could retain his benefits under MP I to which "a ten percent premium would be added." 11 RT 1129:9-18.

The Unions claim that the part of the *Corbett* judgment that gives "current employees an option to take a new increased 'retirement factor,'" shows that *Corbett* creates new benefits because it is stated as a "new percentage and not simply a fractional increase of a percentage." RB at 62-63. To the contrary, however, the evidence shows that the *Corbett* increase was merely a "step up" in the pension multiplier, and not a brand new multiplier. For the general members, one of the options they could select stated that "[their] Retirement Calculation Factor will be ***increased*** from 2.0% at age 55 . . . to 2.25% at age 55 . . . ." Ex. 930-0011:8-10 (emphasis added). John Thomson, on behalf of the Firefighters, testified that the *Corbett* settlement did not confer new benefits, but rather *Corbett* gave a "[step]-up in the, um, percentages in the retirement formula." 11 RT 1131:8-12.

The testimony of David Hopkins (counsel for the City in *Corbett*) also confirmed this fact. He testified that:

> [t]he *Corbett* allegations and the *Corbett* lawsuit had nothing to do with that percentage factor. The *Corbett* lawsuit had to do with only item three on that slide, as those additional pay items would increase that high one year compensation. The percentage factor was nowhere at issue in *Corbett.*

20 RT 3358:1-6. Mr. Hopkins further testified:

> The analogy that I've used is that *Corbett* settled for an increased retirement benefit. The manner in [which] that was calculated is fairly complicated in some circumstances, but settled for an increase and it's as as [sic] if I said, all right, I'm in plaintiff's corner, you want increased benefits. And the City said, all right, I will give you this much of an increase benefit the thickness of this notebook, and that's the consideration that you're going to get in *Corbett*. The amount of that consideration that you're getting that increased benefit doesn't change. If I move the notebook up to [the] judge's bench, the notebook is then higher, but the size of the increase doesn't change, nor does it change if I were to put it on a footstool, that down under my – under my –under this deck. The amount of the increase remains the same and that [was] – the *Corbett* settlement – the consideration for the *Corbett* settlement was that increase.

20 RT 3358:9-28.[19]

In other words, the evidence does not show that the *Corbett* settlement outright awarded a general member a 2.25% at age 55 benefit. Rather, the terms of the settlement agreement only recount the basis for an ***increase*** of 0.25% at age

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[19] *See also* 20 RT 3348:8-11, 15-21 ("What *Corbett* settled for was the plaintiffs giving up their claims for those additional pay items to be added on in exchange for an ***increase*** in retirement benefits . . . . I've sometimes called it the delta. There was a – essentially, there was a negotiation that provided increase retirement benefits to both active employees and retired employees, and it was that increase that was the consideration for the settlement of *Corbett*, and I either called it the 'delta,' the increase, the amount of the increase.").

55 for general members and an increase of 0.5% for safety members. The testimony of David Arce, SDCERS Benefits Administrator (12 RT 1136:23-24), confirms this fact:

> Q. So, um, correct me if I am wrong, but with regard to the column, unmodified factors effective 6-30-00, and unmodified factors effective 7-1-00, the increment there, the step-up in the first column, of the first row, from 2.20 to 2.25, the .25 is what we refer to as the *Corbett* increase, correct?
>
> A. For that age rate and that factor, yes.

13 RT 1555:23-1556:1.

The Unions cling to the trial court's interpretation of portions of the *Corbett* judgment "which give current employees an option to take a new ***increased*** percentage 'retirement factor' which is stated in terms of a new percentage and not a fractional increase of a percentage." 12 CT 3131:14-17 (emphasis added); *see* RB at 62-63. The trial court contradicts this reasoning in the very sentence upon which the Unions rely, however, using the phase "new ***increased*** percentage" rather than just "new percentage."

The only evidence the Unions offer in support of their proposition that the *Corbett* benefits were entirely new benefits is a single question and answer from the City's expert actuarial witness. RB at 63 n.30. In that testimony, however, Mr. Esuchanko testified that the ***cost*** of the benefit, ***not*** the benefit itself, had been incorporated into *Corbett* "because you have the MP-1 benefit as part of the calculation." 24 RT 4334:5-9. Indeed, in a question just preceding this testimony,

the Unions elicited testimony from Mr. Esuchanko confirming that the MP I benefit survived *Corbett*.

> Q. … And essentially, what *Corbett* said to the safety member was he or she could have three percent at 50, ***or*** she could have ***MP-1 plus 10 percent***.
>
> A. Correct.

24 RT 4333:25-28 (emphasis added). Ultimately, the Unions are forced to concede that the MP I retirement factors continued to exist after the *Corbett* settlement.[20]

Leaving no doubt that MP I survived *Corbett*, David Arce, the Benefits Administration Director for SDCERS, 11 RT 1136:20-24, conclusively testified that the *Corbett* settlement ***did not modify the MP I benefits***. 12 RT 1338:27-1339:5 ("Q. And how so if they were [modified]? A. Well, they were ***not modified***. The *Corbett* [sic] allowed a 10 percent increase on those existing [MP I benefits] . . . ."); *see also* 12 RT 1340:3-4 ("A. Well, the *Corbett* – if you were going to select those factors, you get a 10 percent ***increase*** in your [MP I] benefit. . . .") (emphasis added). This fact was confirmed by David Hopkins:

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[20] *See* RB at 63 ("the Judgment which, in addition to providing optional new retirement calculation factors for current employees, required all other benefits to be calculated using the pension benefits which were in effect as of June 30, 2000. For those already retired, this meant the benefits they were already receiving or would receive in the future, even if these benefit amounts had been calculated *under* the MP 1 pension benefit legislation.").

> Q. ... Was [sic] the MP-1 base numbers, were they – would they have any part of this settlement in *Corbett*?
>
> A. No, they were not part of the consideration for the settlement.

20 RT 3376:18-26.[21]

In a futile attempt to address the "increase" issue, the Unions merely reiterate the reasoning of the trial court, placing heavy emphasis on the logic that if MP I is void, then applying percentage premiums to the formula in effect on June 30, 2000 would result in an increase of zero. RB at 62. The argument seems to be that MP I must be valid because otherwise (1) there was no basis upon which to calculate the increase, and (2) the increase would be illusory because it would be a percentage of zero. That argument does not work: (1) if it is a suggestion that using the MP I amounts as a base number impliedly validates MP I, it fails because there can be no implied ratification of a void contract, as discussed above; (2) if it is a suggestion that invalidating the MP I base number cannot be done without setting aside the *Corbett* settlement, that is not correct, as discussed below. The Unions' reasoning is essentially that the incremental increase awarded

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[21] *See also* 20 RT 3348:2-21 (explaining that "what *Corbett* settled for was the plaintiffs giving up their claims for those additional pay items to be added on in exchange for ***an increase*** in retirement benefits . . . . There was a negotiation that provided increased retirement benefits to both active employees and retired employees, and "**it was that increase that was the consideration for the settlement of *Corbett* . . . .**") (emphasis added); *see also* 20 RT 3358:20-27 (explaining that the *Corbett* settlement entailed only a percentage increase factor, not any particular value to each individual beneficiary; the "increase remains the same" and "the consideration for the *Corbett* settlement was that increase.").

in *Corbett* can silently shield the entire underlying benefit amount from scrutiny, which is contrary to the fundamental "strict enforcement" rules underlying the good government laws.[22]

b. The Voidness Of MP I Can Be Determined Without Disturbing The *Corbett* Settlement

Faced with the impossibility of showing that the *Corbett* settlement was a whole new superseding benefit structure, the Unions resort to impracticability arguments, suggesting that it is too difficult to unwind the MP I benefits given the *Corbett* benefit add-on. The burden of the remedy is not a basis for ignoring a Section 1090 violation, however, *e.g.*, *Thomson v. Call,* 38 Cal.3d at 645-48, and the remedy here is practicable. If the MP I benefits are deemed void, SDCERS has the ability to recalculate benefits, as David Arce, SDCERS Benefits Administration Director, readily conceded:

> Q. … Now, if the municipal code is changed and you're told to go back and recompute their pensions, you have the ability to do that?
>
> A. Yes.

12 RT 1366:19-23; *see also* 12 RT 1380:19-1381:2.

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[22] The trial court's "zero basis" logic is also factually groundless. Even if MP I were set aside, that would not mean that the percentage increase awarded in *Corbett* would be calculated based on zero, as the court found. 12 CT 3131:1-6. This is because MP I itself only increased benefits ***from an earlier base amount***—it was not the source of benefits from a zero starting point. 12 CT 3073:9-12. Thus, ***even if MP I were removed from the Corbett Settlement, which the City does not seek, the settlement would not rest on "zero" benefits, but on the pre-MP I factor.***

The removal of the illegally-conferred MP I benefits would ***not*** disturb the *Corbett* settlement. Currently, employees' retirement benefits are calculated by including the MP I amounts and the *Corbett* increase (whether the increased factor or 10%). 12 CT 3130:20-22; AOB at 57. If MP I is voided, the benefits could be calculated by omitting the MP I amount and adding to the new base amount the *Corbett* settlement increase (still calculated based on the earlier MP I amount). In other words, the fact that MP I is still used to ***calculate*** the *Corbett* settlement amount, thereby preserving that settlement, does not preclude voiding the underlying MP I base amount as required by law. *Accord* 12 CT 3131:18-19 ("[t]here is no doubt what benefits were in effect as of June 30, 2000, at the time the *Corbett* Judgment was entered.").

E. THE *GLEASON* SETTLEMENT AND JUDGMENT DO NOT BAR THE CITY'S CLAIMS REGARDLESS OF THE ADDITION OF NEW PARTIES

The question in Phase I of the trial regarding the *Gleason* Settlement was whether the City's claims that MP I and MP II are void are barred because of the *Gleason* Settlement. 12 CT 3114:18-20. Based on the evidence admitted at trial and the governing law, the answer is no: SDCERS was not a plaintiff in *Gleason I*, 12 CT 3144:3-5; therefore, the City is not barred from bringing related claims against SDCERS in this action. *See* Cal. Civ. Proc. Code § 426.30(a) (stating that the bar only applies to plaintiffs in the original action); *Sutton v. Golden Gate Bridge, Highway & Transp. Dist.* (1998) 68 Cal.App.4th 1149, 1155;

Pleasant Valley Canal Co. v. Borror (1998) 61 Cal.App.4th 742, 769; *see also Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 612 (cross-complaint is permissive, not compulsory, between co-parties).

The Unions do not contest this point and they concede that the City was not required to bring a cross-complaint against SDCERS in the *Gleason I* litigation.

Although the answer to the actual issue that the City believed it was litigating—whether the *Gleason* Settlement bars the City's claims—is clearly no, the trial court found a bar by altering the inquiry post-trial and melding the necessary party analysis into the *Gleason* inquiry. The question the trial court answered in its Statement of Decision is whether absent parties joined would then bar the City's claims because of the *Gleason* settlement. The trial court answered that question in the affirmative, reasoning that the City's claims are barred because the City failed to assert a compulsory cross-claim against the pension beneficiaries who were class plaintiffs in *Gleason I*, but who are absent from this case. 12 CT 3145:25–3146:2; 12 CT 3143:3-6 ("***if*** the Court ordered joined the absent, but necessary, participants from *Gleason I* in this action, the *Gleason* settlement and Judgment would bar the City's claims against such individual participants in this action under the doctrine of *res judicata* because the City's claims in this action would have been the subject of a compulsory cross-complaint in *Gleason I*") (emphasis added).

The Unions now rely exclusively on this theory. The Unions claim that "[*t*]*he City does not disagree* that its claims would be barred by the *Gleason*

Judgment if the absent *Gleason I* class members *were* parties to this case." RB at 72. And again, "the City has conceded for purposes of its appeal that, if the trial court's joinder analysis was correct, then its conclusion with regard to the preclusive effect of the *Gleason* case must also stand." *Id.* at 73. That is wishful thinking on the Unions' part for multiple reasons.

1. Regardless Of Whether Absent Parties Are Added, The City's Claims Against SDCERS Are Not Barred By *Res Judicata*

First and foremost, that argument wholly ignores the fundamental allegations of the City's Cross-Complaint: ***SDCERS (not the pension beneficiaries) is the alleged wrongdoer.*** SDCERS violated the law in adopting MP I and MP II, and SDCERS is the defendant sued by the City. Because it is undisputed that *res judicata* does not defeat the City's claims against former co-defendant SDCERS, ***the City's claims against SDCERS are not barred under res judicata by the Gleason settlement even if the absent parties are added to the case***. Stated differently, even if the absent parties all were joined to this case, and even if they could prevail by asserting a *res judicata* defense as to themselves, that would have no impact upon the City's declaratory relief claims against SDCERS, seeking to establish that SDCERS violated conflict of interest and debt limit laws.

2. The City's Current Claims Were Not Compulsory Against The *Gleason* Plaintiffs

In addition, even focusing on the City's claims against the former *Gleason* Plaintiffs, the notion that the City's current claims against SDCERS (for violating Section 1090 and the debt limits laws) were compulsory cross-claims as to Plaintiffs in *Gleason* is fundamentally flawed: A cross-claim is compulsory under CCP Section 426.30 only if it exists in favor of defendant and ***against plaintiff***. *E.g.*, *Black v. Dillon* (1963) 213 Cal.App.2d 295, 296; *see also Maldonado v. Harris* (9th Cir. 2004) 370 F.3d 945, 951-52 (holding that billboard owner's Section 1983 claim against director of California's Department of Transportation was not required to be brought during Department's prior state nuisance action against owner under California's compulsory cross-complaint statute because Section 1983 claim could not have been brought against the Department which was a state agency).

Here, the City's current claims against SDCERS could not have been compulsory cross-claims against the *Gleason* Plaintiffs: As a matter of law, those parties cannot be liable under Section 1090 or the debt limit laws, which apply only to the actions of government. *Klistoff*, 157 Cal.App.4th at 481-82 (private individuals cannot be sued under Section 1090); Cal. Const., art. XVI, § 18 (debt limit laws govern only actions of cities and other governmental bodies). Because the City could not possibly have sued the *Gleason* Plaintiffs for violating these laws, the City's current claims were not compulsory cross-complaints against

those plaintiffs. *Maldonaldo, supra*, 370 F.3d at 951-52. *See generally Cubalevic v. Super. Ct.* (1966) 240 Cal.App.2d 557, 562 (a cross complaint contemplates a pleading which states a cause of action upon which relief may be granted).

In all events, and critically, the City's claims against the *Gleason* Plaintiffs also were not compulsory cross-claims (giving rise to a *res judicata* bar) because ***the compulsory cross-complaint rule has no application to claims for declaratory relief.*** *See, e.g., Industrial Indem. Co. v. Mazon* (1984) 158 Cal.App.3d 862, 866; *Russo v. Scrambler Motorcycles* (1976) 56 Cal.App.3d 112, 116-17; *see also* Cal. Civ. Proc. Code § 426.60(c) ("This article does not apply where the only relief sought is a declaration of the rights and duties of the respective parties in an action for declaratory relief"); *id.* § 1062 (same).

3. The *Gleason* Settlement Agreement Confirms That *Res Judicata* Does Not Bar The City's Claims

Next, even if the absent *Gleason I* class members were parties to this case, the *Gleason* Settlement Agreement itself confirms that *res judicata* does not bar City's claims as to any party—another point the Unions ignore.

The *Gleason* Settlement provides explicitly that *res judicata* shall not apply. First, the *Gleason* Plaintiffs provided releases in the settlement agreement, whereas the City and SDCERS did not. Ex. 433.13 (¶ 4); *see also* 21 RT 3595:10-21. Second, the *Gleason* settlement disclaims any determination of liability on the part of the City. *See* AOB at 82. Such an express limitation prevents *res judicata*

from being applied against the City. *See* AOB 82-83 (citing authority for why the express limitation on the City's liability precludes *res judicata* against the City).

4. *Res Judicata* Does Not Preclude Full Litigation Of This Case Because Of The Intense Public Interest In This Matter

Finally, *res judicata* does not apply because of the intense public interest. This case involves state constitutional violations and improper conflicts of interest which have created an unfunded liability in excess of $1 billion for the City and its residents. 25 RT 4580:1-27. This is clearly a case of important public interest; therefore *res judicata* should not bar consideration of the merits. *See* AOB at 83-84; *see also Consumers Lobby Against Monopolies v. Pub. Utilities Comm.* (1979) 25 Cal.3d 891, 902 ("when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed."). Again, the Unions fail to rebut the City's showing on this point.

F. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE SECTION 1092 STATUTE OF LIMITATIONS BARRED THE SIXTH AMENDED CROSS-COMPLAINT

In addition to dismissing the City's Fifth Amended Cross-Complaint on the erroneous technical grounds discussed above, the trial court found the City's Sixth Amended Cross-Complaint was barred by a one-year statute of limitations, which

the court belatedly elected to apply under Government Code Section 1092. Section 1092 now expressly provides for a four-year limitations period. *See* Cal. Gov. Code § 1092 ("An action under this section shall be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation . . ."). The City's claims undisputedly are timely under Section 1092 as amended.

Despite this clear expression of legislative intent, however, after the Phase One trial, the trial court applied an errant, short-lived and now-superseded judicial decision (*Brandenburg*) to bar the City's remaining claims, and also deprived the City of the opportunity to prove its properly pleaded claims of tolling and continuous accrual in the Phase Two trial reserved for this purpose. Not only was this erroneous as a matter of law, but it is important to remember that even if the trial court were correct in finding the City's Section 1092 claim is time-barred, ***the City's independent claim under the debt limit laws is unaffected by the trial court's limitations ruling***: The parties never argued and the trial court never decided whether the City's claims under the debt limit laws would be time-barred. Thus, the Unions' cavalier assumption that the trial court's statute of limitations ruling moots the other issues in this appeal is simply incorrect.[23]

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[23] While no authority has been found specifying the statute of limitations under the debt limit laws, the governing statute appears to be four years at a minimum because the claim is one to enforce a constitutional provision. *E.g.*, *Berkeley Unified Sch. Dist. v. State of Cal.* (1995) 33 Cal.App.4th 350, 360. It is also possible that there is no statute of limitations governing such a claim. *Hoadley v. San Francisco* (1875) 50 Cal. 265, 275; *California Trout, Inc. v. State*

Moreover, as shown below, the trial court's finding under Section 1092 was error as a matter of law. *See generally Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 872 ("courts have noted that cases should be decided on their merits . . . and that '[t]he public is not to lose its rights through the negligence of its agents in failing to bring suit promptly.").

1. *Brandenburg* Was Incorrectly Decided Because Section 1090 Protects The Public's Right To Be Free From Illegal Conflicts Of Interest

Departing from the weight of prior authority,[24] after this case had been pending several years, the Court of Appeal in *Brandenburg* adopted a one-year limitations period for actions brought under Section 1092. *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1365, *superseded by statute*, Cal. Gov. Code § 1092. The Court of Appeal determined that the nature of the right under Section 1092 was an action for forfeiture, which was governed by a one-year limitations period under CCP Section 340. *Ibid.* This was erroneous.

Courts are required to determine the applicable statute of limitations based on the ***nature of the right sued upon***, ***not*** the form of the action or ***the relief sought***. *Ventura County Nat. Bank v. Macker* (1996) 49 Cal.App.4th 1528, 1530

Water Resources Control Bd. (1989) 207 Cal.App.3d 585, 631 (claim seeking to invalidate government action exceeding state law not barred by any statute).

[24] *See* Augmentation to CT 3401.10-11, filed Apr. 9, 2008 (Senate Judiciary Comment to AB 1678, June 19, 2007) (describing *Marin Healthcare* as the "leading case," which held that actions under Section 1090 fall within the "catch-all" provision of CCP Section 343 governed by a four-year limitations period).

(citing *Smyth v. USAA Property & Cas. Ins. Co.* (1992) 5 Cal.App.4th 1470, 1476). The nature of the cause of action under Section 1090, *i.e.*, the "gravamen" of the cause of action, is not forfeiture, but instead is primarily the avoidance of an illegal contract. *Marin Healthcare Dist.*, 103 Cal.App.4th at 876-77; *see generally Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 23; *Jefferson v. J.E. French Co.* (1960) 54 Cal.2d 717, 719 (holding that where the primary purpose of the action was to recover money under an oral contract, the accounting was merely ancillary to the perfection of plaintiff's contractual right, and that aspect of the action should not operate to avoid the effect of a statute prescribing a period of limitation with respect to the right in issue).

Because the right sued upon in Section 1092 is to set aside an illegal contact, a four-year limitations period should apply. Cal. Gov. Code § 343; *see also Marin Healthcare Dist.*, 103 Cal.App.4th at 870-71, 876-78 (while section 340(1) relating to forfeiture actions "could be argued to apply," "[a]pplying section 343 to this action to void the 1985 contracts on the ground of illegality would certainly be consistent with existing case authority"); *see also Moss v. Moss* (1942) 20 Cal.2d 640, 644-45 (cause of action for cancellation of agreement is governed by four-year statute of limitations under Section 343; there is "no section of the code that expressly limits the time within which an action must be brought for cancellation of an instrument because of its illegality"); *Robertson v. Super. Ct.* (2001) 90 Cal.App.4th 1319, 1326-27 (claim to cancel void contract governed by four-year limitations period in Section 343); *Zakaessian v. Zakaessian* (1945) 70

Cal.App.2d 721, 725 (1945) ("[o]rdinarily a suit to set aside and cancel a void instrument is governed by section 343"); *see generally* 1 Cal. Affirmative Def. §§ 25:40 (2006 ed.) (four-year statute in Section 343 "governs actions to cancel a void instrument").[25]

Thus, as the statutory language and case law suggests, the underlying or primary purpose of Sections 1090 and 1092 is to alleviate the public from an illegal contract by reason of financial conflicts of interest—forfeiture is merely the ***remedy*** or the relief sought as a result of the claim, *see Thompson v. Call* (1985) 38 Cal.3d 633, 646 n.15, and it does not determine the nature of the claim.

The inapplicability of the forfeiture limitations period adopted by *Brandenburg* is also apparent when the nature of forfeiture is examined. "[F]orfeiture" is "the loss of a right . . . ." Black's Law Dict. (7th ed. 1999) p. 661, col. 1. However, no loss of a right occurs under a Section 1090 claim because ***a void contract does not give rise to a right initially***. *See Guthman v. Moss* (1984) 150 Cal.App.3d 501, 507 ("A void contract is no contract at all; it binds no one and is a mere nullity."); *A-Mark Coin Co. v. General Mills, Inc.* (1983) 148 Cal.App.3d 312, 322 ("No rights are enforceable under a void contract."); *see also First Nat. Bank of Calexico v. Thompson* (1931) 212 Cal. 388, 405-406 (contract void due to illegality "has no legal existence for any purpose"); *Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal.2d 450, 453-454 (illegal

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[25] *Accord David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 983 (Section 343 governs claims for breach of fiduciary duty).

contract "may not serve as the foundation of any action, either in law or in equity"); *R.M. Sherman Co. v. W.R. Thomason, Inc.* (1987) 191 Cal. App. 3d 559, 563 (same); *see generally City of Arcata v. Green* (1909) 156 Cal. 759 (no claim against City would lie for rights predicated upon contract outside of City's lawful authority, which was therefore void). Because there is no right created, Section 1092 does not result in "forfeiture" in the true sense; forfeiture (or disgorgement) is merely a potential remedy that implements the lack of any right under a void contract.

Additional support for a four-year statutory period prior to the passage of AB 1678 lies in the express limitations period provided under the analogous Political Reform Act ("PRA"). *See* Cal. Gov. Code § 91011(b) ("No civil action alleging a violation of any provisions of this title . . . shall be filed more than four years after the date the violation occurred."). As with Section 1090, the nature of the right sued upon under Section 91011(b) is an action to cancel an instrument on the ground of illegality, and thus it is subject to a four-year statute of limitations. *Id.*[26]

Because *Brandenburg* incorrectly adopted a one-year limitations period, this Court should follow the better reasoned analysis in *Marin Healthcare* and the

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[26] The PRA is persuasive in interpreting analogous provisions of Section 1090. *People v. Honig* (1996) 48 Cal.App.4th 289, 327; 63 Ops. Cal. Atty. Gen. 19, *available at* 1980 WL 96792 at *5 (PRA provides guidance as to meaning of Section 1090).

other cases, as well as the analogous PRA statute, and hold that prior to AB 1678 the four-year provision of Section 343 governed Section 1092.[27]

2. The Trial Court Erred In Applying *Brandenburg* Retroactively

Even if *Brandenburg* were correctly decided, however, it should not be applied to this case. The general rule of retroactive application of judicial decisions to pending cases does not apply where such retroactive effect causes the party such hardship as to undermine the administration of justice. *See Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 983 ("A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law."); *Kreisher v. Mobil Oil Corp.* (1988) 198 Cal.App.3d 389, 398-99.

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[27] While the trial court concluded that it was bound to follow *Brandenburg*, 13 CT 3419:25-27, obviously as a co-equal appellate court, this Court is not so obligated. *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 n.4; *see also Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1709 (an "intermediate appellate court precedent that might otherwise be binding on a trial court is not absolutely binding on a different panel of the appellate court."). Following *Brandenburg* is particularly unwarranted because this Court now has the benefit of the legislature's intent as to the proper limitations period on a Section 1092 claim, unequivocally expressed in AB 1678. The *Brandenburg* court was not so fortunate: *Brandenburg* was decided July 2, 2007; AB 1678 was not passed until July 12, 2007.

The short-lived (less than six months) *Brandenburg* one-year statute of limitations is precisely the type of decision that should be excluded from retroactive application. The court in *Brandenburg* acknowledged that it was charting a new course, and that earlier decisions supported a much longer limitations period under Section 1092. *Brandenburg, supra*, 152 Cal.App.4th at 1357 (discussing multiple cases including *Marin Healthcare*; *People v. Honig* (1996) 48 Cal.App.4th 289, 304, n.1 (applying the three-year limitations period to actions under section 1097 imposing criminal penalties for willful violations of section 1090); *County of Marin v. Messner* (1941) 44 Cal.App.2d 577, 591 (action to recover money paid without authority under predecessor statute to section 1090 is subject to three-year statute); and *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 294, 297 (three year statute applies for taxpayer's fraud action against the City under section 1090)). *See also Moss v. Moss, supra,* 20 Cal.2d at 644-45.

Given this backdrop of judicial precedent, and the four-year statute under the analogous PRA, the City could not anticipate the statute of limitations drastically constricting during the course of this litigation. When the City filed its cross-complaint, it was within the existing statute of limitations. The trial court should not be able to strip the City's case due to questionable precedent when the City fully complied with the law.

As in *Kreisher*, *Brandenburg* clearly was "deciding an issue of first impression whose resolution was not clearly foreshadowed," and thus, it should only be applied prospectively, particularly given the now-clear legislative intent

for a four-year statute. *Kreisher, supra*, 198 Cal.App.3d at 399 (citations omitted); *see also Parker v. Super. Ct.* (1985) 175 Cal.App.3d 1082, 1090-91 (retroactive application of judicial change in statute of limitations disfavored where effect is to shorten limitations period). *Accord Laird v. Blacker* (1992) 2 Cal.4th 606, 620 (examining recent expression of legislative intent in determining whether court's statute of limitations should be given retroactive application); RB at 43 ("*Marin Healthcare* concluded that the courts must defer to the California legislature . . .").

3. The Trial Court Erred In Failing to Give Due Consideration To AB 1678

Although not dispositive on retroactivity, courts give "due consideration" to the legislature's intent in enacting the statute, and to the "surrounding circumstances." *W. Security Bank v. Super. Ct.* (1997) 15 Cal.4th 232, 243-44. AB 1678 was passed expressly to address pending cases, as indicated by the Senate Judiciary Committee notes, under the section entitled "Need for the bill," which explicitly referenced pending litigation. *See* Augmentation to CT 3401.12, filed Apr. 9, 2008 (Senate Judiciary Committee Comment to AB 1678, June 19, 2007). The official comments of the Senate Judiciary Committee note that cities were running into statute of limitations problems in bringing lawsuits to avoid illegal contracts, and that a four-year limitations period would aid in prosecuting actions to avoid contracts where a Section 1090 violation had occurred. Augmentation to CT 3401.10-11, filed Apr. 9, 2008 (Senate Judiciary Committee Comment to AB 1678, June 19, 2007).

Moreover, in the third reading of the bill in the California Assembly, it was recorded in the official comments that the rationale behind the longer statute of limitations was that Section 1090 claims often involve coordinated action between members of approving boards and private parties. These people often hide their relationships to one another at the time of approval of the illegal contracts, and it is not until later that the public entities discover the illegal activities and seek justice under Section 1090; thus, a minimum of a four-year statute of limitations from the date of discovery by the public entity of the illegality of the contract would protect a public entity's right to recovery under Section 1090. Augmentation to CT 3401.6, filed Apr. 9, 2008 (AB 1678, Assembly Third Reading). Accordingly, the intent of the legislature was to address pending cases where an illegal contract by reason of financial conflict of interests was beleaguering cities, just as in this case.

These circumstances further support this Court's adoption of a four-year limitations period. As one Court of Appeal recently wrote:

> To construe the statute narrowly would permit certain categories of schemes and improprieties to go unchecked, a result which would undermine the public's confidence not only in the government, but in the court system ruling on such cases. An important, prophylactic statute such as section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled.

Carson Redevelopment, supra, 140 Cal.App.4th at 1335. *See also Klistoff v. Super. Ct., supra*, 157 Cal.App.4th at 482 (Section 1090 cannot be given a narrow and technical interpretation that would defeat the legislative purpose).

4. The Trial Court Erroneously Sustained The Demurrer By Reversing its Prior Ruling and Pre-Judging Phase Two Issues

Prior to the City's filing of its 6ACC, the trial court had ruled that the 5ACC was not barred by the either the three-year statute of limitations codified in CCP § 338(a), ***or the one-year statute of limitations*** codified in CCP § 340(a). The court specifically ruled that "paragraphs 53 through 65 of the 5ACC sufficiently allege tolling due to a conspiracy to conceal defendants' wrongdoing. Thus, whether any aspect of this action is time-barred ***is a question of fact that cannot be determined via this demurrer.***" 9 CT 2250 (Court's Final Ruling Re: SDCERS' Demurrer to Fifth Amended Cross-Complaint, dated July 10, 2006) (emphasis added).

The 6ACC contains precisely the same allegations with regard to tolling as the City's 5ACC. 4 CT 955:1-957:27 (5ACC); 13 CT 3243:18-3246:19 (6ACC). The statute of limitations therefore should not have been determined as a matter of law on demurrer. *Geneva Towers Ltd. Partnership v. City of San Francisco* (2003) 29 Cal.4th 769, 700; *Blake v. Wernette* (1976) 57 Cal.App.3d 656, 660-61.

The Unions do not argue otherwise. Rather, the Unions argue that circumstances changed with the issuance of the *Brandenburg* decision. Nothing in *Brandenburg* warranted abandonment of the trial court's finding of a fact issue on

tolling, however. *Brandenburg* did not address tolling; rather, the date of accrual was undisputed in that case. *Brandenburg*, 152 Cal.App.4th at 1356.[28]

Here, the trial court specifically had ordered a Phase Two proceeding solely on the issue of the statute of limitations because the trial court previously found that the City had pleaded (1) a continuing course of conduct "up to the present day" and (2) intentional concealment of the factual basis for this action. 13 CT 3243:20-3246:19. As to these claims, there is no statute of limitations issue because they are based upon continuing obligations, as the court previously concluded. *See* 2 CT 519 (finding, "[w]ith regard to SDCERS' argument that the statute of limitations has run, the City's contention that there has been a continuing violation and that the City is attempting to stop future distributions has merit . . . .").

The basis for the City's continuing course of conduct and tolling allegations is highly fact-specific. *E.g.*, 13 CT 3244:20-27; 13 CT 3245:1-9. It should not have been resolved on demurrer, as the trial court previously recognized. *Geneva Towers Ltd. Partnership v. City of San Francisco*, 29 Cal.4th at 700; *see also* RB at 3 (Unions admit that "parties . . . have not developed a full evidentiary record . .

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[28] The Unions also repeatedly argue that *Marin Healthcare* held that the cause of action accrued at the time of violation, as if to suggest that there could be no delayed accrual under any circumstances. Not only does AB 1678 specifically provide for accrual at time of discovery (rather than time of violation of Section 1090), *see* Cal. Gov't Code § 1092, but *Marin Healthcare* does not support the Unions as tolling was not an issue in that case. *Marin Healthcare*, 103 Cal.App.4th at 880 ("And the District makes no allegation that the commencement of the running of the statute of limitations should be tolled, only that its action is exempt from the otherwise applicable statute of limitations.").

. ."). There is ample authority supporting tolling of the limitations period under the facts in question. *See, e.g., Royal Thrift and Loan Co. v. County Escrow, Inc.* (2004) 123 Cal.App.4th 24, 43 (delayed discovery rule applies to claims involving difficult to detect injuries or breach of fiduciary relationship); *Prudential Home Mortgage Co., Inc. v. Super. Ct.* (1998) 66 Cal.App.4th 1236, 1246-49 (rejecting argument that imputed knowledge from matters in the public record caused statute of limitations to run where defendant was a fiduciary and plaintiffs entitled to rely; delayed discovery rule will prevent accrual of cause of action where "it will generally be difficult for plaintiffs to comprehend the . . . resulting injuries") (internal quotation marks omitted).[29]

In sum, the isolated and erroneous decision in *Brandenburg*—adopting a limitations period subsequently rejected by the legislature—provides no foundation for barring the Section 1090 aspect of this case, much less for preemptively deciding fact issues surrounding the limitations question.

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[29] While the Unions now argue that the "knowledge of the City's executives and elected officers is imputed to the City," citing *McKelvey v. Boeing N. Am., Inc.* (1999) 74 Cal.App.4th 151, 160 (superseded by statute as stated in *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623), the case does not support them. In *McKelvey*, four groups of individuals each brought a separate action against Boeing for causing pollution over several decades. The issue on appeal was whether the statute of limitations had been tolled by the delayed discovery rule. Nowhere did the court hold that "knowledge of the City's executives and elected officers is imputed to the City" as SDCERS claims. Indeed, no municipality—much less a governmental entity—was even a party to the action.

IV. CONCLUSION

If the Unions' claims are as sympathetic as they assert, they will undoubtedly sway the appropriate decisions makers—be they the trial court considering the merits, the City Council or the voters—when the claims are presented and considered in accordance with law. Those alleged equities have no place in this Court, however, which has a duty to broadly and unflinchingly enforce state and local debt limit and conflict of interest laws. The trial court's judgment of dismissal cannot be squared with the mandates of strict enforcement of these important laws and it should be reversed so that a court may once and for all answer the question posed by all parties to the case—whether SDCERS' actions in approving MP I and MP II were lawful.

Respectfully submitted,

Dated: July 28, 2008

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Dated: July 28, 2008

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

APPELLANTS:	San Diego City Attorney Michael J. Aguirre and The City of San Diego	**SDSC JUDGE: Jeffrey B. Barton** **SDSC Dept: 69**
RESPONDENTS:	San Diego City Employees' Retirement System, by and through its Board of Administration; Local 127, American Federation of State, County and Municipal Employees; San Diego Municipal Employees' Association; San Diego Firefighters, Local 145; And the *Abdelnour* Plaintiffs	
PROOF OF SERVICE		**SDSC Case Number: GIC841845** **Court of Appeal Case Number: D051805**

I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 1200 Third Avenue, Suite 1620, San Diego, California, 92101.

On July 28, 2008, I caused to be served the following document described as:

- **APPELLANTS' REPLY BRIEF**

in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

Reg A. Vitek Esq. Michael A. Leone, Esq. SELTZER CAPLAN McMAHON VITEK 750 B Street Suite #2100 San Diego, CA 92101 (619) 685-3003; (619) 685-3100 (fax) vitek@scmv.com; leone@scmv.com ***Attorneys for SDCERS***	Thomas Tosdal, Esq. Ann M. Smith, Esq. TOSDAL SMITH STEINER & WAX 401 West a Street Suite #320 San Diego, CA 92101 (619) 239-7200; (619) 239-6048 (fax) asmith@tosdalsmith.com ***Attorneys for San Diego MEA***
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[x] **(BY MAIL)** I served the individual named by placing the documents in a sealed envelope. I then placed it for collection and mailing with the United States Postal Service this same day, at my address shown above, following ordinary business practices.

[ ] **(BY FAX)** At ____, I transmitted the above-described document by facsimile machine to the above-listed fax numbers. The transmission originated from facsimile phone number (619) 533-5856 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto. [CCP section 1013(e); CRC Rule 2.306].

[ ] **(BY OVERNIGHT DELIVERY)** I caused the envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s). [CCP. section 1013]

[ ] **(BY PERSONAL SERVICE)** I served the individual named by personally delivering the copies to the offices of the addressee.
Time of delivery: _____ a.m./p.m. Person served: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 28, 2008, at San Diego, California.

Jean E. Peters

PROOF OF SERVICE
CCP §§ 1013(A); 2015.5